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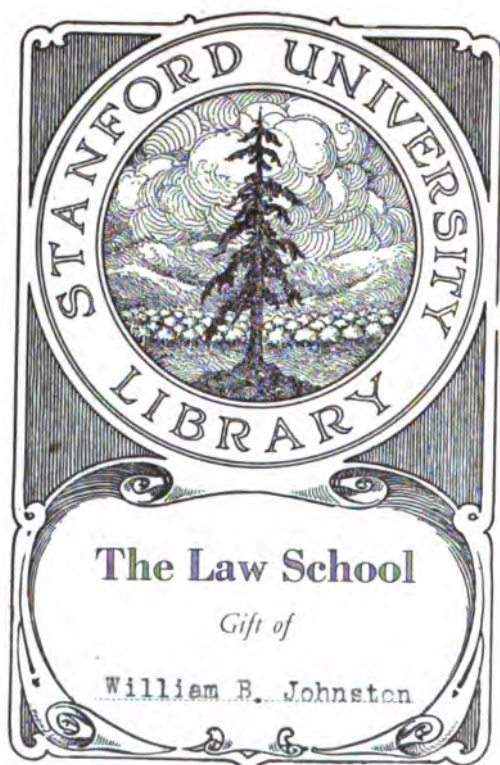
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THE LAW
OF
MUNICIPAL CORPORATIONS

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CHAPTER XV.

CORPORATE PROPERTY.

§ 427. We have next to consider the *powers of municipal corporations relating to property*.¹ The *history of the capacity* of such corporations to acquire and hold property is so clearly given by Mr. Justice *Campbell*, in his learned judgment, in the great *McDonough Will Case*,² in the Supreme Court of the United States, that it fittingly serves as an introduction to the more special discussion and treatment of the subject. *Civil Law*: "The Roman jurisprudence," he observes, "seems originally to have denied to cities a capacity to inherit, or even to take by donation or legacy. They were treated as composed of uncertain persons, who could not perform the acts of volition and personality involved in the acceptance of a succession. The disability was removed by the Emperor *Adrian* in regard to donations and legacies, and soon legacies *ad ornatum civitatis* and *ad honorem civitatis* became frequent. Legacies for the relief of the poor, aged, and helpless, and for the education of children, were ranked of the latter class. This capacity was enlarged by the Christian Emperors, and after the time of *Justinian* there was no impediment. Donations for charitable uses were then favored; and this favorable legislation was diffused over Europe by the canon law, so that it became the common law of Christendom."

§ 428. *Subsequent Modification in Europe*.—"When the power of the clergy began to arouse the jealousy of the temporal authority, and it became a policy to check their influence and wealth—they being, for the most part, the

¹ Extent of legislative authority over the *property* of municipal and public corporations. *Ante*, chap. IV.

² *McDonough Will Case*, 15 How. 867, 408, 1858. The nature of Mr. *McDonough's* will, in favor of the cities of New Orleans and Baltimore, will be found stated further on in this chapter

managers of the property thus appropriated—limitations upon the capacity of donors to make such gifts were first imposed. These commenced in England in the time of Henry III. ; but the learned authors of the history of the corporations of that realm affirm, that cities were not included in them—‘perhaps upon the ground that the grants were for the public good ;’ and, although ‘the same effect was produced by the grant in perpetuity to the inhabitants,’ ‘the same practical inconvenience did not arise from it, nor was it at the time considered a mortmain.’ ‘A century later there was a direct inhibition upon grants to cities, boroughs, and others, which have perpetual commonalty,’ and others ‘which have offices perpetual,’ and, therefore, ‘be as perpetual as people of religion.’ The English statutes of mortmain forfeit to the king or superior lord the estates granted, which right is to be exerted by entry ; a license, therefore, from the king severs the forfeiture. The legal history of the continent on this subject does not materially vary from that of England. The same alternations of favor, encouragement, jealousy, restraint, and prohibition, are discernible. The Code Napoleon, maintaining the spirit of the ordinances of the monarchy, in 1731, 1749, 1762, provides ‘that donations, during life or by will, for the benefit of hospitals of the poor of a commune, or of establishments of public utility, shall not take effect, except so far as they shall be authorized by an ordinance of the government.’ The learned Savigny, writing for Germany, says : ‘Modern legislation, for reasons of policy or political economy, has restrained conveyances in mortmain, but those restrictions formed no part of the common law.’ The laws of Spain contained no material change of the Roman and ecclesiastical laws upon this subject.”

§ 429. *These Restrictions not in Force in this Country.*—“This legislation of Europe was directed to check the wealth and influence of juridical persons who had existed for centuries there, some of whom had outlived the necessities which had led to their organization and endowment. Political reasons entered largely into the motives

for this legislation—reasons which never extended their influence to this continent, and, consequently, it has not been introduced into our systems of jurisprudence.”

§ 430. *Result of Legislation in Europe.*—“The precise result of the legislation is, that corporations there (in England and Europe), with the capacity of acquiring property, must derive their capacity from the sovereign authority, and the practice is to limit that general capacity within narrow limits, or to subject each acquisition to the revisal of the sovereign.”

§ 431. It is a settled rule of the common law that a *grant*, to be valid, must be *to a corporation, or to some certain person* named, who can take, by force of the grant, and hold either in his own right or as trustee.¹ Therefore, a grant by an individual, of a lot of land to “the people of” a specified county, not incorporated, is void.² So a *reservation* in a deed, in favor of the inhabitants of an unincorporated place, is invalid.³ But a grant by the State or

¹ 2 Kent Com. 282, 283; *Whicker v. Hume*, 14 Beav. 509; see, also, *Chambers v. St. Louis*, 29 Mo. 543, 575, and remarks of *Scott, J.*

² Per Mr. Justice *Campbell*, 15 How. 404-407.

³ Co. Litt. 8, *a*; 10 Co. 26, *b*; Com. Dig. tit. *Capacity*, B. 1; *Shep. Touch.* 236. “It is a general rule, that corporations must take and grant by their corporate name.” 2 Kent Com. 291. A corporation aggregate can have no predecessor, and in a writ of right can only count on its own seizin. A statute of 1772, in Massachusetts, provided that twelve persons should be chosen annually by the inhabitants of the town of Boston as overseers of the poor, and they were duly incorporated. In 1822 the town of Boston was changed to a city, the act providing for the election of a board of overseers for the city who shall have all the powers and be subject to all the duties now, by law, pertaining to the overseers of the poor for the town of Boston. It was decided, upon great consideration—*Shaw, C. J.*, delivering the opinion—that this was a *continuance*, and not a *dissolution* or *suspension*, of the corporation of 1772; that the bodies were public corporations, aggregate and not sole, with perpetual succession; that a grant to them of real estate carried the fee, without being, to their successors, and that in a writ of right they can count only upon their own seizin within thirty years next before the commencement of the action. *Overseers of the Poor, &c. v. Sears*, 22 Pick. 122, 1839.

⁴ *Jackson v. Cory*, 8 Johns. 385, 1811; *Jackson v. Hartwell*, *Id.* 422.

⁵ *Hornbeck v. Westbrook*, 9 Johns. 78, 1812. See reference to this case

by the *sovereign authority* having the right to create corporations, to one or more persons who are *named* as patentees for themselves and the inhabitants of a designated town is valid, because the grant itself, coming from this source, confers a capacity to take and hold the lands in a corporate character.¹

§ 432. The English statutes of *mortmain* are not in force in this country, unless by virtue of express legislation to that effect;² and consequently, a municipal corporation has the common law or implied power, unless restrained by charter or statute, to purchase and hold all such real estate as may be necessary to the proper exercise of any power specifically granted, or essential to those purposes of municipal government for which it was created.³ This power

and *Jackson v. Cory*, 8 Johns. 885, by *Savage, C. J.*, in *North Hempstead v. Hempstead*, 2 Wend. 109, 183. Although a deed may not operate as a *grant* because of a want of legal capacity in the grantee to take, yet if it contains a general covenant of warranty it may operate by way of *estoppel*. *Terrett v. Taylor*, 9 Cranch (U. S.) 43, 52, 53; *Mason v. Muncaster*, 9 Wheat. 445. As to grants and devises for charitable purposes, see *infra*.

¹ *North Hempstead v. Hempstead*, 2 Wend. 109, 183, 1828; and see also *Denton v. Jackson*, 2 Johns. Ch. 320; 7 *Id.* 254; *Goodrell v. Jackson*, 20 Johns. 706; *Jackson v. Leroy*, 5 Cow. 397; *Bow v. Allentown*, 34 N. H. 351, 372. The right of a municipal corporation to its grants of property is not destroyed by a change of its name, and an enlargement of its territory, and a reconstruction of its powers. *Girard v. Philadelphia*, 7 Wall. 1; *ante*, chap. IV. sec. 52; chap. V.; chap. VII. sec. 115.

² *Perin v. Carey* (charitable devise to Cincinnati), 24 How. 465, 1860; *Davison College v. Chambers' Executors*, 3 Jones Eq. (N. C.) 253, 1857; 2 Kent Com. 282, 283; *Chambers v. St. Louis*, 29 Mo. 548, 575, *per Scott, J.*; 2 Wash. Real Property (2d edition), 591, top; *Paige v. Heinburg*, 40 Vt. 81.

³ *Ketchum v. Buffalo*, 14 N. Y. 356, 360, 1856, *per Selden, J.*; 2 Kent Com. 281; Co. Litt. 44 a, 800 b; 1 Kyd on Corp. 76, 78, 108, 115; *State v. Commissioners, &c.*, 3 Zab. (N. J.) 510; *Nicoll v. Railroad Company*, 12 N. Y. (2 Kern.) 121, 127; *McCartee v. Orphans' Society*, 9 Cow. 437; *Ex parte Iron Company*, 7 Cow. 240, 552; *Heirs of Reynolds v. Commissioners, &c.*, 5 Ohio, 204, 1831; *Perin v. Carey, supra*; *State v. Brown*, 3 Dutch. (N. J.) 13; *Davison College v. Chambers' Executors* (full discussion), 3 Jones Eq. (N. C.) 253; *Paige v. Heinburg*, 40 Vt. 81; *State v. Madison*, 7 Wis. 688; *Louisville v. Commonwealth*, 1 Duvall (Ky.) 295. Implied or express restrictions on the right to take and hold real estate are not, in this country, construed in a spirit of hostility and jealousy. *Per Scott, J.*, in *Chambers v. St. Louis*, 29 Mo. 548, 573, 576.

may be, and indeed, often is, conferred in express terms, But it may result, in the absence of express provision, as a necessary incident to powers specifically granted. To illustrate the last proposition: Power is given to a city to "establish markets," that is, public places for the sale of commodities. To establish such place, ground is necessary. A market house on the public streets, or on the public square, would be a nuisance. It could not be erected or established upon private property without consent or grant. Thus, by this course of reasoning, the result is reached that power "to establish a market," of necessity, implies or carries with it the power to lease or purchase the requisite site. Such an authority could not probably be deduced from the words "*to regulate* markets," because the words "to regulate" "naturally, if not necessarily, pre-suppose the existence of the thing to be regulated."

§ 433. The *charter is the source of power* in respect to the property rights of the corporation. If the charter be silent, the implied power exists, at least to the extent just stated, to acquire, hold, and alienate or dispose of property. But it is not unusual for the charter to grant the power and fix its limits. Where this done, the terms and purpose of the grant determine the nature, extent, and limitations of the power, the charter being construed, of course, in the light of the general legislation of the state. And general authority to purchase and hold property should, doubtless, be construed to mean for purposes authorized by the charter, and not for speculation or profit.*

* Ketchum v. Buffalo, 14 N. Y. 356, 1856. See, also Peterson v. Mayor, &c. of New York, 17 N. Y. 449, reversing S. C., 4 E. D. Smith, 413, 1858; Le Couteleux v. Buffalo, 38 N. Y. 833, 1865.

* Bank of Michigan v. Niles, 1 Doug. (Mich.) 401; Davison College v. Chambers' Executors, 3 Jones Eq. (N. C.) 253, 1857; State Bank v. Brackenridge, 7 Blackf. (Ind.) 395, 1845. *Ante*, chapters V., VI., XII., XIV. A special provision in a charter authorizing the corporation to take and hold real estate by purchase, is to be construed as meaning that it may do this, subject to the restrictions created by the general statutes of the state relating to this matter. McCartee v. Orphan Asylum Society, 9 Cow. 437, 1827. Charter and general law construed together, being *in pari materia*. Chambers v. St. Louis (Mullanphy Will Case), 29 Mo. 543, 1860. A city, owning the soil, may, like other owners, reclaim the *land between high and low water*

§ 434. "The inference," says Chancellor *Kent*, "from the statutes creating corporations and authorizing them to hold real estate to a certain *limited extent* is, that our statute corporations cannot take and hold real estate for purposes foreign to their institution."¹ In an important

mark, and when thus reclaimed a highway may be laid out upon it. *Richardson v. Boston*, 24 How. (U. S.) 188, and cases cited. *Ante*, sec. 73. Rights to *alluvion* within corporate limits: *Kennedy v. Municipality*, 10 La. An. 54; *Barett v. New Orleans*, 13 *Ib.* 105; *Ib.* 154; *Ib.* 349; *Remy v. Municipality*, 11 *Ib.* 148; *Carrollton Railroad Company v. Winthrop*, 5 *Ib.* 36; *Beaufort v. Duncan*, 1 Jones Law, 234; *Richardson v. Boston*, 24 How. (U. S.) 188, and cases cited. Rights as *riparian proprietor to wharf out*: *Ante*, sec. 70; *Dana v. Wharf Company*, 31 Cal. 118; *People v. Broadway Wharf Company*, *Ib.* 33; *San Francisco v. Calderwood*, *Ib.* 585; *Bell v. Gough*, 3 Zab. 624. *Ante*, secs. 70-75.

A municipality owning land is *not estopped to claim title* to it, because its officers, without authority, have assessed the same to a private person, returned the same as delinquent, and subsequently sold it at a tax sale. The reason is, that all these acts of its officers are unauthorized and void, and a purchaser at a tax sale is bound to take notice of the extent of their powers. *St. Louis v. Gorman*, 29 Mo. 593, 1860. Same principle: *Rossire v. Boston*, 4 Allen, 57; *McFarland v. Kerr*, 10 Bosw. (N. Y.) 249.

As to *adverse possession* against public corporations: *Ib.*; *Turney v. Chamberlain*, 15 Ill. 271; *Alton v. Illinois Transfer Company*, 12 Ill. 60.

Special powers construed: *State v. University*, 4 Humph. 157; *State v. Madison*, 7 Wis. 688; *Beaver Dam v. Frings*, 17 Wis. 398; *Galloway v. London*, Law Rep. 1 H. L. 34; *Heyward v. Mayor, &c. of New York*, 7 N. Y. 314; *Lauenstein v. Fond du Lac*, 28 Wis. 336, 1871. A deed of land to a town and its assigns, for value, expressed in the usual terms of a conveyance, and containing covenants, was construed to grant a fee simple, although the land was expressed to be for the use of a common, or "a meeting-house green." *Beach v. Haynes*, 12 Vt. 15, 1840; *State v. Woodward*, 23 *Ib.* 92, 1850. When conveyance to a corporation passes *a full title*, and not one in trust or conditional: *Kerlin v. Campbell*, 3 Harris (Pa.) 500; *Wright v. Linn*, 9 Barr, 433; *Holiday v. Frisbie*, 15 Cal. 630. When a tract of land is granted for a *specific purpose*, as for a school house, and a school house is erected and a school maintained therein, the grant is not forfeited by the use of a portion of the land, not needed for the school, for other purposes, such as leasing it for cultivation, or for building an engine house thereon, or the like. *Castleton v. Langdon*, 19 Vt. 210, 1847; *vide Index—Dedication*. Under the power to purchase and hold property, a city and county may own buildings as tenants in common, to be used for their respective public purposes. *De Witt v. San Francisco*, 2 Cal. 289, 1852. See *Bergen v. Clarkson*, 1 Halst. (N. J.) 352. *Ante*, p. 209, sec. 92. Rights of county and city respecting jail built by the corporate authorities of the city. *Felts v. The Mayor, &c.*, 2 Head (Tenn.) 363.

¹ Kent Com. 283.

case in Louisiana it was decided that a purchase of real estate by the corporation of the defendant, for \$247,000, payable in bonds, at twenty-five years from date, for the purpose of platting and re-selling the same, and thereby improve the salubrity of the city, and promote the convenience of citizens as to streets, was legal.¹ If the court was right in holding that the charter and laws authorized the purchase of real estate without restriction,—which admits of doubt,—the case shows the wisdom of the usual limitations in charters disabling such corporations from acquiring, by purchase, real estate for other than corporate purposes.

§ 435. Municipal corporations being created chiefly for governmental purposes, and for the attainment of local objects merely, the general rule is that they cannot purchase and hold real estate *beyond their territorial limits*, unless this power is conferred by the legislature.² It has been expressly decided that a conveyance to a municipal corporation of lands beyond its boundaries, for the purpose of a *street*, is void, though the corporation has, by its charter, power “to purchase, hold, and convey any real property for the public use of the corporation.”³ The author is inclined to think that there are purposes for which such a corporation may, without special grant, purchase and hold lands extra-territorial, as for a pest house, cemetery, and the like objects of a municipal character.⁴

§ 436. Municipal and public corporations *may be the*

¹ *Municipality v. McDonough*, 2 Rob. (La.) 244, 1842.

² *Denton v. Jackson*, 2 Johns. Ch. 336; *North Hempstead v. Hempstead*, 2 Wend. 131; *Hopk.* 594; *Riley v. Rochester*, 9 N. Y. (5 Seld.) 64, 1853, reversing S. C., 13 Barb. 321; *Girard v. New Orleans*, 2 La. An. 897; *Chambers v. St. Louis*, 29 Mo. 543, 1850; *Bullock v. Curry*, 2 Met. (Ky.) 171; *Concord v. Boscawen*, 17 N. H. 465.

³ *Riley v. Rochester*, *supra*.

⁴ See observations of *Scott, J.*, *Chambers v. St. Louis*, 29 Mo. 542, 574, 575, as to object of express authority to hold lands beyond corporate limits for such purposes. Municipal corporations may, for proper or authorized purposes, *hold lands in other states*, unless restrained by the laws of the latter state. The right depends upon comity, or the consent, expressed or implied, of the sister state. *McDonough Will Case*, 15 How. (U. S.) 567, 1863; *Angell & Ames Corp.* chap. V. sec. 161; 1 Wash. Real Property, 50, pl. 27; *Chambers v. St. Louis*, *supra*; *Seebold v. Shitler*, 34 Pa. St. 133

objects of public and private bounty. This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Legacies of personal property, devises of real property, and gifts of either species of property, directly to the corporation and for its own use and benefit, intended to and which have the effect to ease them of their obligations or lighten the burdens of their citizens, are valid in law, in the absence of disabling or restraining statutes.¹ Thus, a conveyance of land to a town or other public corporation *for benevolent or public purposes*, as for a site for a school house, city or town house, and the like, is based upon a sufficient consideration, and such conveyances are liberally construed in support of the object contemplated.*

Bank of Augusta v. Earle, 18 Pet. 519, 584, 1889; *Runyan v. Coster's Lessee*, 14 Id. 122. In these last two cases the extra-territorial rights of corporations are very elaborately discussed and examined.

¹ *Inhabitants, &c. of Sutton v. Cole*, 8 Pick. 232, 288, 1825, *per Parker, C. J.*; *Inhabitants, &c. of Worcester v. Eaton*, 13 Mass. 371, 378, 1816; *Hamden v. Rice*, 24 Conn. 350, 1856; *Cogshall v. Pelton*, 7 Johns. Ch. 292 (bequest to erect town house); *McDonough Will Case*, 15 How. 367, 1855; 2 Kent Com. 285; *Angell & Ames*, secs. 177, 178.

Speaking of Missouri, *Scott, J.*, says: "There is nothing in our statute concerning wills which prohibits corporations from taking by devise; so that, as to their capacity to take by devise, they stand on the same ground as natural persons." *Chambers v. St. Louis*, 29 Mo. 543, 574. So in Ohio. *Perin v. Carey*, 24 How. 465, 505, *per Wayne, J.* In New York, by the statute of wills, following the English statutes of Henry VIII., "bodies politic and corporate" are incapacitated to take real estate, and a devise *directly* to a corporation, and not to a natural person in trust for the corporation, was adjudged to be void by the statute, and this notwithstanding the corporate devisee was, by its charter, declared to be "capable in law of purchasing, holding, and conveying real estate for the use of the said corporation." This special authority to take by "*purchase*" (which term was held not to include a *devise*) was, by the majority of the Court of Errors, considered to mean subject to the restrictions and incapacities created by the general statutes. *McCartee v. Orphan Asylum Society*, 9 Cow. 437, 1828. As to devises in New York in trust for a corporation, under statute. *see Theological Seminary v. Childs*, 4 Paige, 418; *Wright v. M. E. Church*, 1 Hoff. Ch. 225. But authority to a corporation to take land "by direct purchase or otherwise," gives capacity to take by devise. *Downing v. Marshall*, 23 N. Y. 366, 1861. Authority "to hold, purchase, and convey," confers capacity to receive a devise of lands. *American Bible Society v. Marshall*, 15 Ohio St. 537.

¹ *Castleton v. Langdon* (land conveyed to town for school house), 19 Vt.

§ 437. Not only may municipal corporations take and hold property in their own right by direct gift, conveyance, or devise, but the cases firmly establish the principle, also, that such corporations, at least in this country, are capable, unless specially restrained, of *taking property*, real and personal, *in trust* for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out or perfecting those objects. So such corporations may become *cestuis que trust* within the scope of the purposes for which they are created. And where the trust reposed in the corporation is for the benefit of the corporation, or for a charity within the scope of its duties, it may be compelled, in equity, to administer and execute it But

210, 1847; *Jackson v. Pike* (land conveyed to county for court house and jail), 9 Cow. 61, 1823; *State v. Atkinson* ("public common"), 24 Vt. 448; *Le Couteleux v. Buffalo* (conveyance for "free school"), 83 N. Y. 833, 1865; *French v. Quincy* (conveyance for "town house"), 8 Allen, 9. Corporations may, for such purposes, purchase and take the *fee* of lands, and change the location at will. This is unlike the ordinary case of the dedication by an individual of the *use* of lands to some public purpose—*e. g.* a town common—in which case the corporation cannot alien the land. *Beach v. Haynes*, 12 Vt. 15, 1840; *State v. Woodward*, 23 Id. 92, 1850. That municipal corporations may be authorized to take, hold, and alienate lands *in fee*, see also, 2 Kent Com. 281; *Heyward v. Mayor, &c. of New York*, 7 N. Y. 314, 1852; *The People v. Mauran*, 5 Denio, 389, 1848; *Heirs of Reynolds v. Commissionera, &c.*, 5 Ohio, 204, 1848; *Nicoll v. Railroad Company*, 12 N. Y. 131, 1854; *Paige v. Heinburg*, 40 Vt. 81.

¹ 2 Kent Com. 279, 280; *Jackson v. Hartwell*, 8 Johns. 422; 1 Kyd, 72; *Green v. Rutherford*, 1 Ves. 462; *Trustees, &c. v. King*, 12 Mass. 546; *Pickering v. Shotwell*, 10 Barr (Pa.) 27; *Chambers v. St. Louis*, 29 Mo. 543, 1860; *Mayor, &c. v. Elliot*, 3 Rawle (Pa.), 170; *McDonough Will Case*, 15 How. 367, 1853; *McDonough's Case* (in Supreme Court of Louisiana), 8 La. An. 171, 1853; *Girard's Will*, 2 La. An. 898; 2 How. 127, 1844; 7 Wall. 1; 2 Wash. Real Prop. 205, pl. 3; *Angell & Ames Corp. sec. 168*; *Willis Trust*. 33-45; *Perin v. Carey*, 24 How. 465, 1860; *Bell county v. Alexander*, 22 Texas, 350, 1858; *Columbia Bridge v. Kline, Bright. (Pa.)* 320; *Miller v. Lerch*, 1 Wall. Jr. (Pa.) 210; *Webb v. Neal*, 5 Allen, 575, 1863.

It is quite usual in England for municipal corporations to hold property for *charitable trusts* of a public nature, over the administration of which chancery has jurisdiction, and the subject of such trusts is regulated by the Municipal Corporations Act of 5 and 6 Will. IV. chap. LXXVI. sec. 71. See *Rex v. Saukey*, 5 A. & E. 423; *Grant Corp.* 136. Tolls granted by charter to a corporation, for the reparation of walls and bridges within the borough, are gifts for charitable purposes, within 39 Eliz. chap. V., to be

the *legislature may divest* a municipal corporation of the *power to administer the charitable trusts* conferred upon it, and appoint or provide for the appointment of new trustees independent of the corporation, and vest in them the management of such trusts.'

administered in chancery. Attorney General *v. Shrewsbury*, 6 Beav. 220; *In re Corporation of Newcastle*, 12 Cl. & F. 402; *Ib.* 487; Mayor, &c. *v.* Attorney General, 3 Cl. & F. 289; 2 Spence Eq. Jurisd. 33 *et seq.*; *post*, sec. 615a.

* *Philadelphia v. Fox*, 64 Pa. St. 169, 1870. In this case the constitutionality of the act of June 30, 1869, depriving the City of Philadelphia of the power to administer the trusts under wills of Mr. Girard and others, and vesting the powers of the city in this respect in an independent and separate board, not appointed by the city, was sustained. In giving the judgment of the court Mr. Justice *Sharswood*, in the course of his interesting and learned opinion, remarks:

"A municipal corporation may be a trustee, under the grant or will of an individual or private corporation, but only, as it seems, for public purposes, germane to its objects. The Mayor *v. Elliott*, 3 Rawle, 170; *Cresson's Appeal*, 6 Casey, 437; *Vidal v. The Mayor*, 2 How. 127. I am aware that it has been said by high authority in England that it may take and hold in trust for purposes altogether private. The Mayor *v. Gloucester*, 1 House of Lords, 285. But the administration of such trusts, and the consequent liabilities incurred, are altogether inconsistent with the public duties imposed upon the municipality. It could hardly be pretended, I think, in this country, that it could be a trustee for the separate use of a married woman, to educate the children of a donor or testator, or to accumulate for the benefit of particular persons. It certainly is not compellable to execute such trusts, nor does it seem competent to accept and administer them. The trusts held by the City of Philadelphia, which are enumerated in the bill before us, are germane to its objects. They are charities, and all charities are in some sense public. If a trust is for any particular persons it is not a charity. Indefiniteness is of its essence. The objects to be benefited are strangers to the donor or testator. The widening and improvement of streets and avenues, planting them with ornamental and shade trees, the education of orphans; the building of school houses, the assistance and encouragement of young mechanics, rewarding ingenuity in the useful arts, the establishment and support of hospitals, the distribution of soup, bread, or fuel to the necessitous, are objects within the general scope and purpose of the municipality. The king himself may be a trustee, though he cannot be reached by the process of any court without his consent. *Hill on Trustees*, 49. And so may the State, though, as I take it, under the Constitution, only for objects germane to the purpose of government. The government of the United States has accepted and administered such a trust under the will of James Smithson "for the promotion of knowledge among men." When, therefore, the donors or testators of these

§ 438. The leading case in this country on the subject mentioned in the last section is the celebrated *Girard Will Case*, reported in the Supreme Court of the United States, under the name of *Vidal v. Girard's Executors*.¹ Better to

charitable funds granted or devised them in trust to the municipality, they must be held to have done so with the full knowledge that their trustee so selected was a mere creature of the state, an agent acting under a revocable power. Substantially they trusted the good faith of the sovereign. It is plain—too plain, indeed, for argument—that the corporation, by accepting such trusts, could not thereby invest itself with any immunity from legislative action. Such an act could not change its essential nature. It is surely not competent for a mere municipal organization, which is made a trustee of a charity, to set up a vested right in that character to maintain such organization in the form in which it existed when the trust was created, and thereby prevent the state from changing it as the public interest may require. *Montpelier v. East Montpelier*, 29 Verm. 21. This whole question is put at rest, and that as to one of the most important of these trusts and as to its trustees, by the opinion of the Supreme Court of the United States in *Girard v. Philadelphia*, 7 Wallace, 14. 'It cannot admit of a doubt,' says Mr. Justice *Grier*, 'that where there is a valid devise to a corporation, in trust for charitable purposes, unaffected by any question as to its validity because of superstition, the sovereign may interfere to enforce the execution of the trusts, either by changing the administrator if the corporation be dissolved, or if not, by modifying or enlarging its franchises, provided the trust be not perverted, and no wrong done to the beneficiaries. Where the trustee is a corporation, no modification of its franchises or change in its name, while its identity remains, can affect its right to hold property devised to it for any purpose.' With equal plausibility might it be pretended that the acceptance by the government of the United States of the bequest of James Smithson limited the power of amendment contained in the Federal Constitution. If it could have such effects, the only logical consequence would be that the acceptance of a trust would be *ultra vires*, and void; and so if the acceptance of a trust by a municipal corporation can operate to impair the power of the sovereign over it as such, the acceptance is a nullity."

¹ *Vidal v. Girard's Executors*, 2 How. 127, 1844. The court lays down this rule: "Where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that if the trust be repugnant to, or inconsistent with, the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But it will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust." Reaffirmed, *Perin v. Carey*, 24 How. 465, 1860; *Girard v. Philadelphia*, 7 Wall. 1, 1868. The

understand the case, it may be stated that the act incorporating the city of Philadelphia expressly provided that the corporation should have power "to purchase, take, possess, and enjoy lands, franchises, goods, chattels," &c., without limitation as to value or amount; and 32 and 34 Henry VIII., disabling corporations from taking by devise, was declared not to be in force in Pennsylvania. Under these circumstances, it was held that the corporation of the city had the capacity to take real and personal property by *devise*, as well as by deed. The city also possessed general power "for the suppression of vice and immorality, the advancement of the public health and order, and the promotion of trade, industry, and happiness." Girard's devise was *to the city, in trust*, for the establishment of a *college for the education and support of indigent orphan boys*. This presented the inquiry whether the corporation

following further observations of Mr. Justice Story (who delivered the opinion of the court in the Girard Will Case) are of especial value: "If the purposes of the trust be germane to the objects of the incorporation; i. they relate to matters which will promote, and aid, and perfect those objects; if they tend (as the charter of the city of Philadelphia expresses it) 'to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness,' where is the law to be found which prohibits the corporation from taking the devise upon such trust, in a state where the statutes of mortmain do not exist (as they do not in Pennsylvania), the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know of no authorities which inculcate such a doctrine or prohibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government, and regulation, and powers. If, for example, the testator by his present will had devised certain estate of the value of \$1,000,000 for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the uses of its citizens, from the river Schuylkill, why, although not specifically enumerated among the objects of the charter, would not such a devise upon such a trust have been valid, and within the scope of the legitimate purposes of the corporation, and the corporation capable of executing it as trustees?" The learned judge further observes: "Neither is there any positive objection, in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of the institution, but collateral to them." See, also, 24 How. 465, *supra*. By this it is not meant that a corporation may take and *execute* trusts for objects "utterly *dehors* the purposes of the incorporation."

was capable of taking real and personal estate in trust, and of executing the trust, and the affirmative of both propositions was adjudged.

§ 439. The *McDonough Will Case* affords an interesting and instructive illustration of the foregoing principles. John McDonough died in New Orleans, and, by will, gave a large amount of real and personal property to the city of New Orleans (his adopted residence) and to the city of Baltimore (his native place), and their successors forever, with a prohibition against any alienation or division of the real estate, under penalty of forfeiture. This devise was made for the purpose of "*educating the poor*, without the cost of a cent to them, *in the cities of New Orleans and Baltimore*, and their respective suburbs." The estate thus devised was to be managed by six agents, three to be selected annually by each city, and the municipal authorities were, by the will, excluded from the management of the estate or the application of its revenues. By the civil code of Louisiana, corporations created by law are permitted to possess an estate, *receive donations and legacies*, make valid contracts and manage their own business; and the city of New Orleans was, by statute, authorized and required to establish *public schools* for gratuitous education, &c. The city of Baltimore was authorized, by statute, to establish *public schools*, and to receive property in trust, and to control and exercise the trust for any of its general corporate purposes, including educational and charitable purposes of any description, within its limits. This will was contested by the heirs. It was held by the Supreme Court of the United States that these cities, under the powers conferred upon them, had the right to receive this devise, and that the will was valid. It was also held that under the Louisiana code (C. C. 2026), the prohibition against alienation did not invalidate the will.¹

¹ McDonough Will Case, 15 How. (U. S.) 867, 1853. The same will was previously adjudged to be valid by the Supreme Court of Louisiana. Mr. Chief Justice *Eustis*, in delivering the opinion of the state court, sustaining McDonough's will, says: "That, without a positive prohibition, municipal corporations in Louisiana should be incapacitated from receiving legacies for the public purposes of health, education, and charity, seems to me re-

§ 440. The subject again underwent a full examination in the *McMicken Will Case*, reported under the name of *Perin v. Carey*.¹ Charles McMicken devised and bequeathed a large amount of real and personal property, "to the city of Cincinnati and its successors, in trust, for the purpose of building, establishing, and maintaining, two colleges for the *education* of boys and girls, and if there shall remain a sufficient surplus of funds, the same to be applied to the *support* of poor white male and female orphans." By the will, the city is directed to make and establish all necessary regulations, and to appoint directors to the institution; and it is *prohibited from ever selling* any portion of the real estate devised, or any which the city should purchase for the benefit of said institution. By its charter, the city had express power given it to acquire and hold real estate for the legitimate objects of the city. There was nothing in the charter or statutes of the state prohibiting the city from taking and administering charitable trusts. The court decided that the will was valid; that the city, as a corporation, was capable of taking and administering the devises and bequests for the charitable uses specified; and that the restraint upon alienation created no perpetuity in the sense forbidden by the law.

§ 441. By the *will of Mr. Bryan Mullanphy* (founding a charity now in beneficent operation), he devised "one-third of all his property, real and personal, to the *city of St. Louis in trust*, to be and constitute a fund *to furnish relief to all poor emigrants and travelers coming to St. Louis on their way, bona fide*, to settle in the west." The

pugnant to all sound ideas of policy, and to the reason of the law." 8 La. An. 171, 1853. The Girard legacy was sustained by the same court. *Girard Heirs v. New Orleans*, 2 La. An. 898.

¹ *Perin v. Carey*, 24 How. 645, 1860. In Maryland (where, however, the statute of 43 Elizabeth is not in force) a devise to the city of Baltimore, "to be applied, under the direction of said corporation, to the relief and support of the indigent and necessitous poor persons who may, from time to time, reside within the limits, as now known, of the twelfth ward of said city," was adjudged void, as being "too vague and indefinite, and too difficult of being correctly ascertained, to be enforced." The case was regarded as being embraced in the prior decisions. *Tripp v. Frazier*, 4 Har & Johns. 446; *Dashiell v. Attorney General*, 5 Ib. 892; 6 Ib. 1.

greater part of his estate, valued at over \$1,500,000, consisted of lands in St. Louis county, but outside of the city limits. It was held, under special provisions of the statute and charter of the city, that the city corporation had the capacity to take, and that, as the statute concerning wills did not prohibit it, it could take by devise the same as natural persons. It was further held, that the city could take upon the trusts mentioned in the will, and could execute them subject to the control of the Court of Equity, whose jurisdiction in Missouri was considered to be founded not upon the statute of 43 Elizabeth, but upon the common law.¹

§ 442. So a bequest to the city of Philadelphia, in trust, to purchase a lot of ground in the city or neighborhood, and erect thereon *a hospital for the indigent, blind, and lame*, and to apply the income of the remainder to the comfort and accommodation of as many of such persons as it will admit of, giving preference to persons resident in Philadelphia or its neighborhood, is valid, since it is in trust for objects within the scope of the corporate duties of the city.² Other instances showing the capacity of public corporations to take property and to act as trustees, are given in the note.³

¹ Chambers v. St. Louis, 29 Mo. 543, 1860.

² Mayor, &c. of Philadelphia v. Elliott, 8 Rawl. (Pa.) 170.

³ A bequest "to the citizens of W. to purchase a *fire engine*," was regarded as a charitable gift, and sustained, the court considering the name, whether to the corporation or the citizens composing it, as immaterial, and that, as the object was meritorious, the testator's intention should be allowed to take effect, notwithstanding any misnomer or other defect in name or form. Wright v. Linn, 9 Barr, 433. See Kirk v. King, 8 Ib. 436; School Directors v. Dunkelberger, 6 Ib. 31. As to *name and misnomer*, see ante, secs. 121-123.

In Texas it is decided, that a bequest to a county "for the benefit of *public schools*," is not void for uncertainty, and that it is consistent with the object and function of the corporation which may take and administer such a trust. And so of a bequest for the benefit of *indigent persons* residing in the county, counties being charged with the duty of providing for the support of the poor. Bell County, v. Alexander, 22 Texas, 350, 1858. A school society in Connecticut is a corporation, and as such it is held that it may, upon well settled principles, take a devise or bequest in trust for *educational purposes*. First Congregational Society, &c. v. Atwater, 28

§ 443. But municipal corporations cannot, for the same reasons applicable to ordinary corporations aggregate, hold lands *in trust for any object or matter foreign to the purpose* for which they are created, and in which they have no interest.¹ Thus, while the supervisors of a *county*, who are made, by statute, a corporation for special purposes, may take by grant a parcel of land *in trust* that they should erect a court house and jail, these being county purposes; yet they cannot be seized as trustees for the use of an individual, or in trust for building a church or school house for the use of the inhabitants of a *particular town* in the county.² So a corporation, with authority to establish, in

Conn. 84, 1854. Bequest held void because the "*school commissioners*" named were not a corporate body. *Janey's Executor v. Latane*, 4 Leigh (Va.) 327, 1838.

A devise to a town of property "to be used by the town in repairing its *highways and bridges* yearly," being in its character both public and charitable, is valid, not only by a special statute in Connecticut, but also, it would seem, without the aid of any special enactment. *Hamden v. Rice*, 24 Conn. 350, 1856; *Cogshall v. Pelton*, 7 Johns. Ch. 292 (bequest to erect town house). See, also, *Attorney General v. Shrewsbury*, 6 Beav. 220. In Ohio, "gifts, grants, and devises to the poor of any township," are, by statute (Swan's Stat. 687) "good and valid in law" when made *directly* to the poor; and they are held to be good when made to a trustee, in trust for the *poor of a township*. *Urmey's Executor v. Wooden*, 1 Ohio St. 160, 1853. Bequest "*to the orphans*" of a municipal corporation sustained: *Succession of, &c.*, 2 Rob. (La.) 438. In Indiana, the statute of 48 Elizabeth, chap. IV. is in force (*McCord v. Ochiltree*, 8 Blackf. 15), and a devise of real property in a town in that state to be "for ever appropriated to the education of ——— children of this town," is within that statute, and valid, and trustees will be appointed by the court to manage the trust. *Richmond v. State*, 5 Ind. 384, 1854.

¹ 1 Plowd. 108; 1 Kyd on Corp. 72. In matter of *Howe*, 1 Paige, 214, 1828; *Trustees v. Peaslee*, 15 N. H. 817, 831; *Farmer's Loan, &c. Co. v. Carroll*, 5 Barb. 613; *Hornbeck v. Westbrook*, 9 Johns. 73; *North Hempstead v. Hempstead*, 2 Wend. 109; *Coggeshall v. New Rochelle* (legacy for town house), 7 Johns. Ch. 292; *Sloan v. McConahy*, 4 Ohio, 157.

² *Jackson v. Hartwell*, 8 Johns. 422. See, also, *Jackson v. Cory*, 8 Johns. 385.

"Our laws are full of instances of persons clothed with corporate powers for certain special purposes. The loan officers of a county are a corporation; and could they, as such, receive a grant of land for the use of a town or of a church? Certainly not. Nor can the supervisors of Oneida county take a grant of land for the use of the town of Rome. Such a grant must

a designated town, an institution "for the instruction of youth," cannot be a trustee under a will or grant to hold funds and pay over the income thereof for the support of missionaries.'

§ 444. Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has ac-

be deemed void upon every principle, whether we consider the special and defined objects of a corporate capacity in the board of supervisors; whether we consider the power given them by statute, to take conveyances of land for the *use of the county*; or, lastly, whether we refer to the incapacity of all corporations to hold lands in trust for any other object than that for which the corporation was created. Whether the Court of Equity would or would not prevent the trust as to the inhabitants of Rome from failing for want of a trustee, is not a question for a court of law [in an action of ejectment] to decide." *Per Curiam*, in *Jackson v. Hartwell*, 8 Johns. 422, 1811. Legislature or chancery may, in proper cases, appoint trustees. *Bryant v. McCandless*, 7 Ohio, part 2, 135; *Chapin v. School District*, 35 N. H. 445; *Girard Will Case*, 2 How. 127; *Shotwell v. Mott*, 2 Sandf. Ch. 46. It was said by Mr. Justice *Story*, in *Vidal v. Mayor, &c. of Philadelphia*, 2 How. (U. S.) 128, that there is "no positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of its institution, but collateral to it; nay, for the benefit of a stranger, or another corporation." See, also, *Perin v. Carey*, 24 How. 465, 1860, *per Wayne, J.* But Chancellor Kent, in stating that a corporation may be a trustee, adds: "And at this day, the only reasonable limitation is, that it cannot be seized of land in trust for purposes foreign to its institution." 2 Kent Com. 280.

¹ *Trustees v. Pearslee*, 15 N. H. 317, 1844. But towns in New Hampshire, it has been decided, may legally hold lands in trust for the support of religion *within* their limits. The *Dublin Case*, 38 N. H. 450, 1859. "Such instances," says *Perley, C. J.*, giving the judgment of the court (*Id.* p. 577), "are, it is believed, very numerous in this state." "Under our constitution, no one can entertain a doubt that to maintain the institutions of religion is an object quite consistent with the general purpose for which towns are created, and that towns have at least an indirect interest in promoting religion within their limits."

As towns in Massachusetts were liable, by statute, under a penalty, for neglect to support schools (*ante*, sec. 11), and as *parishes* (organizations created for parochial or religious purposes) may legally establish schools and raise taxes to maintain them, though not required to do so under a penalty for neglect, as towns are, it was decided by the Supreme Court of that state, that a parish, as well as a town, was capable of taking and holding a devise of real estate, "to be applied for the use of schools." *Parish in Sutton v. Cole*, 3 Pick. 232, 1825. In this case the court seemed to be of opinion that such corporations could not take or hold real property for purposes *wholly foreign* to the specific objects for which they were created.

quired, and is holding, such property for other purposes, is a question which can only be determined in a proceeding instituted at the *instance of the State*. If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a complete sale, and whether the corporation, in purchasing, exceeds its power, is a question between it and the State, and does not concern the vendor or others.¹

§ 445. Municipal corporations possess the *incidental or implied right to alienate* or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute; they cannot, of course, dispose of property of a public nature, in violation of the trusts upon which it is held, nor of the public squares, streets, or commons.² The distinction is between property

¹ *Chambers v. St. Louis* (Mullanphy's devise to city of St. Louis), 29 Mo. 543, 577, 1860; *Land v. Hoffman*, 12 Am. Law Reg. (N. S.) March, 1873, p. 143, and Mr. *Johnson's* note; S. C., 50 Mo. 243, 1872; *Smith v. Sheeley*, 12 Wall. 35; *Myers v. Croft*, 13 Wall. 291; S. C., 11 Am. Law Reg. (N. S.) 308; *Goundie v. Water Company*, 7 Pa. St. 233, 1847; *Leazure v. Hillegas*, 7 Serg. & Rawl. 313, 320, 1821; *Davison College v. Chambers's Executors*, 3 Jones Eq. (N. C.) 253, 258, *per Pearson, J.* A corporation cannot hold property in violation of its charter, nor can it take it in violation of its charter by an act of the law. *Ib.* See *Bank, &c. v. Niles*, 1 Doug. (Mich.) 401. *The Banks v. Poitiaux*, 3 Rand. (Va.) 136; *Martin v. Bank*, 15 Ala. 587; *Baird v. Bank*, 11 Serg. & Rawl. 411; *Angell & Ames Corp. secs.* 152, 153. "If a corporation be forbidden by its charter to purchase or take land, a deed made to it would be void." *Ib.*; *Leazure v. Hillegas*, 7 Serg. & Rawl. 313. A deed of real estate was made by *Betsy Flagg* to the town of *Worcester*, in consideration of five dollars (nominal), and that the town should support her (she being lawfully settled in the town) while single. The court, without deciding that the acceptance of a deed by the officers of the town the consideration of which imposes upon the inhabitants any expense or burden, would create a binding contract on the part of the town, or that the grantor might not avoid a deed, of which such obligation was the only consideration, held that the town, on the delivery of the deed to it, became seized of the estate, could maintain ejectment against a disseisor, and that the deed would remain good until avoided by the grantor, or by some one in privity of estate. *Inhabitants of Worcester v. Eaton*, 13 Mass. 371, 1816. The court say (*Ib.* p. 378), "whether the inhabitants of a town can be assessed to raise money to purchase lands to be used for any other purpose than the execution of some lawful requisition, is a different question."

² *Kyd*, 108; *Smith v. Barrett*, 1 Siderf. 162; 2 Kent Com. 281; *Reynolds*

which a corporation may own the same as a natural person, and that which it holds in general or special trust. The

v. Stark County, 5 Ohio, 204, 1831; *Augusta v. Perkins*, 8 B. Mon. 437; *Colchester v. Lowton*, 1 Vesey & Beame, 226; *Alvez v. Henderson*, 16 B. Mon. 131, 168, 1855; *Bowlin v. Furman*, 28 Mo. 427; *Kennedy v. Covington*, 8 Dana, 50; *Newark v. Elliott*, 5 Ohio St. 113, 1855; *Ransom v. Boal*, 29 Iowa, 68, 1870; *Angell & Ames Corp. sec. 187*; *Sill v. Lansingburg* (conveyance of public square void), 16 Barb. 107; *Knox County v. McComb*, 19 Ohio St. 320; *Philadelphia v. Railroad Company*, 58 Pa. St. 253; *Holliday v. Frisbie*, 15 Cal. 630, 1860. *Ante*, sec. 396. *Supervisors v. Patterson*, 56 Ill. 111, 1870. *Post*, chap. XXII.

A corporation may alien land held by it in *fee simple*, though purchased for the use of a common. *Beach v. Haynes*, 12 Vt. 15, 1840. But not, if after its purchase it has dedicated it to the public. *State v. Woodward*, 23 Vt. 92, 1850.

Where an act of the legislature confers upon a corporation the power to sell certain property originally donated by the state to the corporation, and enumerates the objects for which such sale may be made, it is not competent for the corporation to dedicate such property to the public use of the citizens. *Wright v. Victoria*, 4 Texas, 375.

Mr. Grant, after an examination of the English authorities, observes that "no decision of the common law courts, directly in point, can be found, laying down the law to be, that to *alien* its real property at pleasure is incident to a corporation." Grant, 129, 134. But in this country there can be no doubt as to the general *implied authority* of corporations, unless restrained, to dispose of property of a private nature. *Newark v. Elliott*, 5 Ohio St. 113; 2 Washb. Real Prop. 588 (2d edition), top. The English Municipal Corporations Act of 1835 imposes certain specific restraints on the right of municipal corporations to alien, mortgage, or lease their real property. 5 and 6 Will. IV. chap. LXXVI. sec. 94; Grant Corp. 140. *Post*, chap. XXII.

A condition annexed to a grant of land in fee simple by a city corporation may, as in the case of similar conditions in the deed of an individual, be dispensed with or waived by the grantor, and this as well by acts as by express agreement, and when once dispensed with or waived, it is gone forever. *Sharon Iron Company v. Erie*, 41 Pa. St. 341, 1861. As to breach of condition in a deed of land to be used only as a place for a town house. *French v. Quincy*, 3 Allen, 9. A municipal corporation, having by its charter full power to purchase, hold, and convey lands, received, for a valuable consideration, a deed of a parcel of land containing one acre, "for the use of the said town," for the purposes mentioned in the deed: the deed then states, in substance, that it is conveyed for a court house and jail to be erected and kept thereon, with a proviso that if it ceased to be used for such purposes, the property was to re-vest in the grantor. While the land was used by the town for the specified purposes, the title was held to be in the town, and it was held that the grantor could not interfere to prevent the town from leasing portions of the tract not needed for the purposes specially named in the deed. The court was of opinion that the true construction of the grant

rights of the corporation as a property holder are distinct from the *legislative* rights of the corporation: the corporation may alien its private property, but it cannot (as elsewhere shown) cede away the power of municipal control.

§ 446. In some of the States it is held that the private property of municipal corporations, that is, such as they own for *profit*, and charged with no public trusts or uses, may be sold on execution against them.¹ In other States, either by statute, or on general principles, it is declared that judgments against municipal corporations cannot be enforced by ordinary writs of execution, and that the remedy of the creditor is by *mandamus* to compel payment, or the levy of a tax for that purpose. Questions of this kind are influenced much by local legislation.² On prin-

was, that while the condition on which the corporation held the lot was not broken, they had full dominion over it, and might use it as they saw fit. *Bolling v. Petersburg*, 8 Leigh (Va.) 224, 1837.

See chapters on Streets and Dedication, *post*.

¹ *Holliday v. Frisbie*, 15 Cal. 630, 1860; *Davenport v. Insurance Company*, 17 Iowa, 276; *Louisville v. Commonwealth* (as to public and private property), 1 Duvall (Ky.) 295; *ante*, sec. 64 and note; *New Orleans v. Insurance Company*, 23 La. An. 61, 1871. Further, see chapters on Dedication and *Mandamus, post*. And an act of the legislature of the state granting to a state certain real property within its limits, with a proviso in the act that the city shall pay into the state treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising from the sale or other disposition of the property, gives to the city an *absolute interest*, qualified by no conditions or trusts attaching to the property, and subject to no specific uses, and hence the property may be levied on and sold under execution. *Holliday v. Frisbie*, above cited.

In *Foster v. Fowler*, 60 Pa. St. 27, 1868, the corporation known as the Monongahela Water Company, empowered to introduce water into a city for the use of the inhabitants, was held to be a public corporation, and, on principles recognized in Pennsylvania, it was held that its buildings and property, necessary to carry on its operations, could not be seized and sold on execution, or be subjected to a mechanic's lien. See, also, *Winslow v. Commissioners, &c. of County*, 64 Nor. Car. 218, 1870. Judgment against county which has no private property must be enforced by *mandamus* and not by execution. *Gooch v. Gregory*, 65 Nor. Car. 142.

² *Craue v. Fond du Lac*, 16 Wis. 196, 1862; *Chicago v. Halsey*, 25 Ill. 595, 1861; *Commonwealth v. Allegheny County*, 37 Pa. St. 277, 290; *Commonwealth v. Perkins*, 43 Pa. St. 400; *State v. Milwaukee*, 20 Wis. 87; *State v. Beloit*, 16 Mo. 79, 1865; *infra*, sec. 686.

ciple, in the absence of statutable provision, it would seem to be a sound view to hold that the right to contract and the power to be sued gives the creditors a right to recover judgments; that judgments should be enforceable by execution against the strictly private property of the corporation, but not any against property owned or used by the corporation for public purposes, such as public buildings, hospitals and cemeteries, fire engines and apparatus, water works, and the like; and that judgments should not be deemed liens upon real property except when it may be taken in execution.¹ Outside of the New England States the creditors of a municipal corporation cannot resort, for the purpose of making their debts, to the private property of the inhabitants.²

§ 447. If the charter or constituent act of the corporation prescribes a particular *mode* in which *the property* of the corporation *shall be disposed of*, that mode must be pursued. This is well illustrated in an interesting and important series of adjudications in California known as the "City Slip Cases," in which, upon the most sedate and deliberate consideration, it was repeatedly held, where the officers of the city, under the authority of a *void* ordinance, made sales of real estate belonging to the city, that no title passed, and that under the charter of the city (which required sales of its property to be made by an ordinance adopted for the purpose, after advertisement of the time, place, and terms of sale) the appropriation, for municipal purposes, of the proceeds of the sales, while it would impose on the city the liability to pay back to the purchasers the moneys received from them, would not have the effect to ratify the sales.³

¹ Schaffer v. Cadwallader, 36 Pa. St. 126, 1860; Davenport v. Insurance Company, above cited; President, &c. v. Indianapolis, 12 Ind. 620; Lamb v. Shays, 14 Iowa, 567; Cole v. Green, 25 Ill. 104; Green v. Marks, 24 Ill. 221. *Post*, chapter on Mandamus.

² Horner v. Coffey, 25 Miss. (3 Cush.) 434, 1853. The court refused to follow the doctrine laid down in Beardsley v. Smith, 16 Conn. 368. *Post*, chap. XX.

As to exemption of *municipal revenues* from judicial seizure, and as to *garnishment* of municipal corporations, see *ante*, secs. 64, 65.

³ McCracken v. San Francisco, 16 Cal. 591, 1860; Grojan v. San Francisco,

§ 448. Where property is held by the corporation without restriction, it may doubtless *mortgage* it to secure any debt or obligation that it has the power to create or enter into. The power to mortgage, if not expressly given or denied, would be an incident to the power to hold and dispose of property, and to make contracts.¹ Power given to the city of Memphis, in its charter, "to hold real, personal, or mixed property," and "to sell, lease, or dispose of, the same, for the use and benefit of the city," was held by the Supreme Court of Tennessee to confer without further legislative authority, and by necessary implication, the power upon the common council of the city of Memphis to mortgage a large tract of land ceded to the city in fee by the United States, lying within the corporate limits, to secure the payment of a large number and amount of bonds to be issued by a railroad company, to aid in the construction of its railroad, one of whose termini was on the bank of the river opposite Memphis, the court regarding this as a proper corporation purpose, and for the benefit of the city.² It will be seen that here was no special or express legislative authority to the city to aid it by pledging its property to secure bonds issued by the railroad company. Without express authority the city could not have guaranteed the bonds of the company; and upon the accepted canons of construction of municipal powers, the author cannot concur with the learned court in the doctrine that the ordinary clause in the charter giving the municipality the authority to take, hold, sell, and dispose of, property, empowered it

18 Cal. 590, 1861; *Picmental v. San Francisco*, 21 Cal. 351, 1863. In these cases, the principles stated in the text are vindicated with characteristic clearness and striking logical force in able and interesting opinions of Mr. Chief Justice *Field*, now holding a seat on the Supreme Bench of the United States. See, also, *Satterlee v. San Francisco*, 23 Cal. 214, 1863; *Herzo v. San Francisco*, 33 Cal. 184, 1867. *Ante*, secs. 373, 383, 384. *Post*, sec. 750.

See *ante*, chap. XIV. as to *modes* of contracting. *Modes* of exercising corporate powers: *Ante*, chap. V.; *post*, chap. XIX. *Infra*, sec. 730.

¹ As to power to mortgage real estate. *Middleton Bank v. Dubuque*, 15 Iowa, 304; *Braham v. San Jose*, 24 Cal. 585; *Gordon v. Preston*, 1 Watts (Pa.) 385; *Goodwin v. McGehee*, 15 Ala. 233, 1849.

² *Adams v. Railroad Company*, 2 Coldw. (Tenn.) 645, 1866.

to pledge it as a security for the bonds or debts of the railway company.¹

§ 449. It is undoubtedly competent for the legislature to authorize municipal corporations to pass an ordinance providing, in all *leases* of corporate property, that if the rent remain unpaid, the corporation may terminate the lease by a resolution to that effect, in which case equity could not, at least, ordinarily, relieve against the forfeiture. So such a corporation may, by stipulation in the lease, provide for such a forfeiture, but in this case the right to forfeit owes its existence to the convention of the parties, and not to the action of the corporation in its political or legislative capacity; and where the right to forfeit rests upon *contract*, equity may relieve against it the same as if the contract was made between private individuals.²

§ 450. *Conveyances of real estate* should, in general, be *executed in the corporate name* and under the *corporate seal*.³ If the constituent act or charter prescribes the conditions upon which the conveyance of its real estate shall be made—as, for example, if it requires the previous con-

¹ See *ante*, chap. VI. sec. 104, *et seq.* *Ante*, sec. 393.

² *Taylor v. Carondelet*, 22 Mo. 105, 1855, where this subject is very ably discussed. The dissenting opinion of *Leonard, J.*, in the special case in judgment, probably rests upon the most tenable ground. See, also, *Woodson v. Skinner* (power to annul sale), 22 Mo. 13; *State of Maryland v. Railroad Company*, 3 How. (U. S.) 534.

Power to lease. *Bush v. Whitney*, 1 Chip. (Vt.) 369; *Angell & Ames*, sec. 191; *Grant Corp.* 146; *Taylor v. Carondelet*, 22 Mo. 105. Lease valid, though it does not use precise *corporate name*. *McDonald v. Schneider*, 27 Mo. 405. No particular language essential. *Poole v. Bentley*, 12 East, 168. *Estoppel* of lessee to deny title of corporation lessor. *St. Louis v. Merton*, 6 Mo. 476.

As to necessity of *seal*, see Index—*Seal*; *Pennington v. Tanier*, 12 Queen's R. 1011; *Grant Corp.* 146. *Ante*, chaps. VIII. and XIV.

³ *Kent Com.* 291. As to name and misnomer, see *ante*, chap. VIII.; also, *De Zeng v. Beekman*, 2 Hill (N. Y.) 489, 1842; *Miners' Ditch Company v. Zellerbach*, 37 Cal. 543, 1869.

“In general, corporations must *take and convey their lands* and other property in the *same manner as individuals*; the laws relating to the transfer of property being equally applicable to both.” *Angell & Ames Corp.* sec. 193.

sent of a majority of the legal voters, a conveyance without such consent is void.¹ A conveyance of real estate, regular on its face, and under the corporate seal, executed by a municipal corporation having the power to dispose of its property, will be presumed to have been executed in pursuance of that power, and hence it is unnecessary for the grantee or party claiming under it, to produce the special resolution or ordinance authorizing its execution.²

§ 451. A town cannot, without express authority, pass the legal title to lands *by a vote*, and when conveyed by an agent under the authority of a vote, regularly, the deed should be in the name of the principal.³ A corporation in

¹ *Sill v. Lansingburg*, 16 Barb. 107; *Middleton Bank v. Dubuque*, 15 Iowa, 394. In Vermont, the selectmen of the several towns in which there are glebe lands, are empowered by statute to *lease* them. This was held to be the extent of their authority, and an absolute conveyance was utterly void, neither conveying title to the grantee nor affecting the rights of the town. *Bush v. Whitney*, 1 Chip. (Vt.) 369, 1821.

As to liability on *covenants of warranty* in conveyances of real estate, to which the municipality had no title or right to convey. *Findler v. San Francisco*, 13 Cal. 534.

² *Jamison v. Fopiana*, 43 Mo. 565, 1869; *Swartz v. Page*, 13 Mo. 603, 1850; *Choquette v. Barada*, 33 Mo. 249, 1862; *Flint v. Clinton County*, 12 N. H. 43. See *Hart v. Stone*, 30 Conn. 94. When authorized by statute the conveyance need not recite the authority by which it is made. *Henry v. Atkinson*, 50 Mo. 266, 1872.

Conveyances of real property by the officers of a municipal corporation must be made by virtue of a special authority for that purpose. *Merrill v. Burbank*, 23 Maine, 538, 1844. *How given*. *Clark v. Pratt*, 47 Maine, 55; *Hascarl v. Somany*, Freeman. 504; *Grant Corp.* 146. *Requisites and proof of corporate conveyances*. *Osborn v. Tunis*, 1 Dutch. (N. J.) 633, 658; *Lovett v. Steam, &c. Association*, 6 Paige, 54; *Hamilton v. Railroad Co.*, 9 Ind. 359; *Middleton Bank v. Dubuque* (deed by mayor *pro tempore*), 19 Iowa, 467; *Gourley v. Hawkins*, 2 Iowa, 75.

³ *Cofran v. Cochran*, 5 N. H. 458, 1831; *Coburn v. Ellemwood*, 4 N. H. 99, 102, and cases cited. As to title under a vote, where possession is taken, see *Copp v. Neal*, 7 N. H. 275, 278, and authorities cited. In *Ward v. Bartholomew*, 6 Pick. 409, it was held that a conveyance of land by an individual as an agent of the commonwealth under a resolve authorizing him to convey, might be sufficient even if the deed was executed in the name of the agent. And in *Cofran v. Cochran*, *supra*, it was determined that from long usage, and in view of the great public mischief which would be produced by a contrary holding, land might be conveyed by a deed in the name of a duly authorized agent of the town. This decision is expressly put

North Carolina was the owner of the land on which the town was laid out; and between Front-street and the water of the sound there was a small strip of land. After the town was laid out, the corporation passed this ordinance: "*Ordered*, That for the future, whatever small strips of land are to be found between the outward line of Front-street and the water shall be the property of the person owning the front lot on the opposite side of the street." In *ejectment* by the corporation, it was held that this ordinance did not operate as a deed to pass the title: *first*, for the want of the seal of the grantors; *second*, for the want of a consideration; and *third*, for the want of delivery. Not only so, but it was held to be so obviously defective as a conveyance as not to give the "color of title" to the defendant, necessary (under the statute and decisions of North Carolina) to support an adverse possession.¹

upon the maxim "*Communis error facit jus*." Special legislative authority to certain "*trustees*" (declared to be a body corporate) to sell a lot is well executed by a deed in which the grantors describe themselves properly as the "*trustees*," and then sign and seal the conveyance in their individual names. *De Zeng v. Beekman*, 2 Hill (N. Y.) 479, 1842.

¹ *Beaufort v. Duncan*, 1 Jones (N. C.) Law, 239, 1853. But a release by a municipal corporation of a right in real property, by ordinance and not by deed, may be enforced in equity, when within the scope of the corporate power, and the releasee has paid the consideration, or entered into possession and made valuable improvements on the faith of it. *Grant v. Davenport*, 18 Iowa, 179, *obiter*, per *Wright*, C. J.

Remedy against *collusive alienations* of property by municipal councils, *post*, sec. 730.

Liability of municipal corporation as an owner of property; *post*, chap. XXIII.

CHAPTER XVI.

EMINENT DOMAIN.

§ 452. Among the important powers usually conferred upon municipal corporations and deserving separate treatment, is the authority to exercise, by delegation from the legislature, the right of Eminent Domain; that is, compulsorily to take private property, on making compensation in the prescribed mode, for designated municipal or public purposes. In this chapter the general nature of the power; the constitutional restrictions upon it; the principles which govern the construction and application of the legislative authority necessary to its existence and exercise by public agencies; the mode and measure of compensation to the property owner, will be considered with special reference to the power and the purposes for which it is commonly delegated to municipal corporations.¹

§ 453. Social duties and obligations are paramount to individual rights and interests. Private rights not under the shield of the organic law must yield when they come in conflict with public necessity or the general good. The maxim, *salus populi suprema lex*, has an important mean-

¹ In the tenth chapter of the valuable work of Judge *Redfield* on the Law of Railways, and particularly in the last edition, the right of Eminent Domain, in connection with Railways, is exhaustively treated, and may be usefully consulted by whoever desires to have a view of the present state of the English and American law upon almost any branch of this interesting inquiry. The learned author does not confine his consideration of the subject to its bearings on railways, but the nature of the right, the limitations upon its exercise, the mode of procedure, the time when compensation is to be made, and the rules to measure its amount are clearly stated and fully illustrated.

In his excellent work on Constitutional Limitations, chapter fifteen, Judge *Cooley* has presented the subject, particularly in its constitutional aspects, in a manner extremely satisfactory. Mr. *Sedgwick's* view, although less practical, will be found to be of great interest and value. *Sedgwick* on Stat. and Const. Law, 498-534.

ing in its application to private rights, and in limiting the absoluteness of any possible ownership of private property. The legislature, as the authoritative representative of the public, and the constituted judge of what is demanded by the general weal, has the right to say, under such constitutional restrictions as may exist in the particular state, to every private proprietor, "the public needs of your property thus much," and the individual must submit. This is a right inherent in every government. It is a tremendous power, and one which is without theoretical limits, and, indeed, without any legal limitations except such as may exist in written organic restraints upon legislative action. It has, in addition, practical limitations in the sense of justice, which ever prevails in enlightened communities, and which legislators cannot for any considerable period effectually or safely disregard; and experience has shown that there is a point beyond which no government can press its demands upon its subjects or citizens and continue to exist. One branch of this governmental prerogative is known by the name *Taxation*, which, in its application to municipalities, will be noticed in another chapter; and the other arm of this transcendent and underlying authority is now familiarly known as the power of *Eminent Domain*, by which is meant the right of every government to appropriate, otherwise than by taxation and its police authority (which are distinct powers), private property for public use.¹

§ 454. In the *constitution of the United States*, and in the constitutions of the different states, there is a *limitation upon the power* of eminent domain, usually expressed in substantially these words: "Private property shall not be taken for public use without just compensation." In some of the constitutions there are, in addition, special provisions of more recent origin, as to the mode of ascertaining the amount of the compensation and the time and manner of payment. Full treatment of this subject in its constitutional and other aspects would not be appropriate to the

¹ As to the phrase *Eminent Domain*, see Mr. Justice Campbell's article on the "Taking of Private Property for Purposes of Utility." Vol. I. No. 2. Bench and Bar, p. 112.

present work, and our consideration of it will accordingly be limited to a statement of the general principles relating to it, and a reference to the cases which illustrate the power as exercised by municipal corporations under delegated legislative authority.¹

§ 455. Mr. *Sedgwick* sums up his interesting examination of the *limitations upon the power* of the legislature over the appropriation of private property to public uses, and his statement of the result will serve as an appropriate introduction to our consideration of the subject in its application to municipal corporations. He says: "If the brief and sweeping clause, 'Private property shall not be taken for public use without just compensation,' be made to express the modifications and qualifications which construction has inserted in it and added to it, it will stand nearly as follows: Private property shall in no case be taken for *private* use. Private property may be taken for public use in the exercise of the general police powers of the state, or of taxation, without making compensation therefor. And the

¹ The fifth article of the amendments of the *constitution of the United States* was intended to prevent the general government from taking private property for public use without just compensation, and was *not* intended as a restraint upon the *state governments*. *Barron v. Baltimore*, 7 Pet. 243, 1833; *Withers v. Buckley*, 20 How. (U. S.) 84, 1857. The right of eminent domain residing in a state, says the Supreme Court of the United States, is an independent power, and all property is held, and all contracts are made subject to this right. Therefore, the exercise of this right by the state does not impair the obligation of contracts within the meaning of the prohibition of the constitution of the United States. Hence a toll bridge owned by a private corporation, chartered by the state for that purpose, may, under the right of eminent domain, and under a general law of the state authorizing the act, be condemned and taken as part of a public road, compensation being made to the corporation in the same manner as to natural persons. Such an exercise of the right of eminent domain does not impair the obligation of the contract between the bridge corporation and the state. *West River Bridge Company v. Dix*, 6 How. (U. S.) 507, 1848, affirming judgment of the Supreme Court of Vermont; *Railroad Company v. Railroad Company*, 13 How 71. The *same principle* has been frequently declared by the *state courts*. *Railroad Company v. Kennedy*, 39 Ala. (N. S.) 307; *Toll Bridge Company v. Railroad Company*, 17 Conn. 40; *Ib.* 454; *Railroad Company v. Railroad Company*, 2 Gray, 1; *Bridge Company v. Lowell*, 4 Gray, 474; *Bridge Company v. Clarksville*, 1 Sneed, 176; *Armington v. Barnet*, 15 Vt. 745; *Redfield on Railways*, sec. 70.

power of taxation includes the power of charging the expense of local improvement exclusively upon those immediately benefited thereby. Private property may also be taken for public use in the exercise of the power of eminent domain, but not without just compensation being made or provided for before the taking is absolutely consummated. The right to compensation, however, does not attach in cases where the value of property is merely impaired and title to it not divested; nor does it exist in cases where the right to the property taken is not absolutely vested at the time of the legislative act affecting it. This is substantially the form that the constitutional provision has assumed in the hands of the courts; and upon a careful examination of the process by which this result has been arrived at, it must be admitted that in practice our constitutional guarantees are very flexible things, and that the judicial power exerts an influence in our system which makes the subject of interpretation one of the first magnitude.”¹

§ 456. As the legislature is the sole judge of the public necessity which requires or renders expedient the exercise of the power of eminent domain without the owner's consent, so it is the exclusive judge of the *amount* of land or *the estate in land* which the public end to be subserved requires shall be taken. But as the right originates in necessity, so it is limited by it. The principle and its limitations have found interesting illustrations in cases which we shall notice, arising under powers conferred upon municipalities to enable them to execute certain public purposes. The legislature has the constitutional power expressly to authorize a municipal corporation *compulsorily* to acquire *the absolute fee simple* to lands of private persons, required for public use, upon the payment of a just

¹ Sedgwick, Stat. and Const. Law, 533, 534. It is not competent for the legislature to provide if a person shall make *improvements upon ground which will be embraced in a street*, if subsequently laid out and extended, that he shall not, if such street is subsequently laid out, be entitled to damages for such improvement. Such a provision is unconstitutional, because it deprives the owner of the use of his land, without compensation. *Moale v. Baltimore*, 5 Md. 314, 1854. *Post*, sec. 784.

compensation.' Accordingly, a statute "to enable" a city "to abate a nuisance and for the preservation of the public health," authorized the city to "purchase or otherwise take lands" within a large district, on payment of damages to the owners, and which directed the city to raise and drain the same, so as "to abate the present nuisance thereon," and declaring, further, that the "title to all land so taken shall vest in the city," was held to *vest the fee* of such lands in the city, and was not unconstitutional, because it authorized the taking of a greater interest in the land than was necessary, nor as an attempt to exercise judicial power.' To land *the fee simple of which is thus acquired* by a municipal corporation, its title is perfect, and *it does not revert* when sold by the corporation, or when the public good, in the opinion of the corporate authorities, requires the land to be used for other purposes than those for which it was originally obtained.'

§ 457. The cases which have established that the legisla-

¹ *Heyward v. Mayor, &c. of New York*, 7 N. Y. (8 Seld.) 314, 1852, affirming S. C., 8 Barb. 486; distinguished from *Embury v. Connor*, 3 Const. 511, where an *unnecessary amount* was sought to be taken; *S. P. Dingley v. Boston*, 100 Mass. 544, 1868; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 1871. So in North Carolina it is held that the legislature may authorize not simply the *use*, but the *entire interest* of the owner to be taken for public use, if it deem the public exigency requires it. *Railroad Company v. Davis*, 2 Dev. & Bat. (Nor. Car.) Law, 451, 1837; *De Varaigne v. Fox*, 2 Blatchf. C. C. 95; *Kane v. Baltimore*, 15 Md. 240, *arguendo*; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 1871. See, also, *Moore v. Same*, 8 Md. 110 (power over dower interest); *Matter of John and Cherry Streets*, 19 Wend. 650 (as to reverter of discontinued streets to adjacent owners); *Kimball v. Kenosha*, 4 Wis. 321. An enactment that on payment for land for a public park, it shall "vest for ever in the city," gives to the city a fee simple title to land thus acquired. *Brooklyn Park Commissioners v. Armstrong*, 3 Lansing (N. Y.) 429, 1871; 45 N. Y. 234, 1871. *Infra*, sec. 468.

² *Dingley v. Boston*, 100 Mass. 544, 1868.

³ *Heyward v. Mayor, &c. of New York*, 7 N. Y. (8 Seld.) 314, 1852; *De Varaigne v. Fox*, 2 Blatchf. C. C. 95, 1848; *Heirs of Reynolds v. Commissioners, &c.*, 5 Ohio, 204, 1831; *Le Clercq v. Gallipolis*, 7 Ohio, part I. 218, 1835. See, also, chapter on Corporate Property, *ante*, and on Dedication, *post*. City corporation, owning land in fee, held entitled to compensation when taken for public use. *Ninth Avenue*, 45 N. Y. 729. *Ante*, chap. IV.

ture may, if it sees proper, authorize the compulsory appropriation of the fee, are to be distinguished from those in which it has been held that *no more in amount of private property* can be taken than the legislature has declared to be necessary to the accomplishment of the public purpose in view, even although compensation be made. It was accordingly decided in South Carolina, on sound principles, that the State cannot authorize part of a lot to be taken for a street, and, in addition, compel the owner, against his will, to part with the balance for the benefit, emolument, or private purposes of the corporation, since, in the opinion of the court, such an act "disseizes or deprives" the owner of his property "without the judgment of his peers," and contrary "to the law of the land."

§ 458. And the *same principle* was subsequently declared by the Supreme Court and by the Court of Appeals of the state of New York, and of the state of Maryland.¹ The constitution of the state of New York contained the provision that "no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The legislature enacted, with reference to the city of New York, that whenever *part* only of a lot should be required for a street, the commissioners for assessing compensation might, if they deemed it expedient, include the *whole* lot, and that the part not required for the street should, upon confirmation of their report, be vested in fee in the city, with authority to appropriate it to public uses, or if not thus appropriated, to sell it. The court in-

¹ *Dunn v. Charleston, Harper* (South Car.) Law, 189, 1825. This decision is right. Other cases in South Carolina, holding that private property may be taken for streets, roads, &c., against the owner's consent and *without compensation* (*State v. Dawson*, 3 Hill (South Car.) 100, and cases cited), are not elsewhere regarded as law. Sedgwick on Stat. and Const. Law, 494. In *Patrick v. Commissioners*, 4 McCord, 540, 1828, it was held that the legislature might authorize a street to be laid out on private property without making compensation.

² *Albany Street* (in matter of), 11 Wend. 148, 1834; *Embury v. Conner*, 3 N. Y. (3 Comst.) 511, 1850; reversing S. C., 2 Sandf. 98; *Baltimore v. Clunet*, 23 Md. 449, 1865.

clined to the opinion, that the legislature did not intend by this provision to authorize the compulsory taking of more land than the public needed, and that the statute should be construed so as to require the *owner's consent* to the appropriation of the part not required for the public use. But the court expressly decided that if the statute did intend to authorize the compulsory taking of the whole, when part only was required for the use of a street, it would be in conflict with the above provision of the constitution of the state guaranteeing protection to private property. It was, however, further adjudged, that the owner's consent to the appropriation would remove all objections on the ground of the unconstitutionality of the statute; that such consent need not be in writing, and that the receipt by the owner of damages allowed by the commissioners, is evidence of his consent.¹

¹ Referring to this statute, in *Embury v. Conner*, *supra*, *Jewett, J.*, delivering the opinion of the Court of Appeals, says: "It needs no argument to show that the end and design of this section was not to take private property for the use of the public. It manifestly goes upon the ground that the property so authorized to be taken is not wanted for the purpose of forming or improving a street, the object in view for which the proceedings are instituted. In the Matter of Albany Street, 11 Wend. 148, the constitutionality of this enactment came directly under the consideration of the Supreme Court, on application to confirm the report of the commissioners in that matter. The court then held, that if that provision was intended merely to give to the corporation *capacity* to take property under such circumstances, with the *consent* of the owner, and then to dispose of it, there could be no objection to it. But if it was to be taken literally, that the commissioners might, against the consent of the owner, take the whole lot, when only a part was required for public use, and the residue to be applied to private use, it assumed a power which the legislature did not possess.

"This decision went mainly upon the application contained in the last member of the clause of section 7 of article 7 of the constitution of 1821, that 'No person shall be deprived of life, liberty, or property, *without due process of law*; nor shall private property be taken for public use without just compensation.' Chief Justice *Savage* said: 'The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the private use of another.' In *Bloodgood v. The Mohawk & Hudson Railroad Company*, 18 Wend. 59, Mr. Senator Tracy said the words should be construed, 'As equivalent to a constitutional declaration that private property, without the consent of the owner, shall be taken *only for the public use*, and then only upon a just compensation.' *Bronson*,

§ 459. As *dower* is not the result of contract, but is a positive legislative institution, it is constitutionally con-

J., in *Taylor v. Porter*, 4 Hill, 147, in reference to this question, said, that although he felt no disposition to question the soundness of these views, yet that it seemed to him that the case stood stronger upon the first member of the clause, 'No person shall be deprived of life, liberty, or property, *without due process of law.*' That the words, 'due process of law,' in that place, could not mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. The same doctrine was held in the matter of *John and Cherry Streets*, 19 Wend. 659, and by the chancellor in *Varick v. Smith*, 5 Paige, 187, and was admitted by all the members of the court for the correction of errors, whose opinions have been reported in the case referred to, of *Bloodgood v. The Mohawk & Hudson Railroad Company*. I think these decisions should be regarded as having settled the point, that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation is made. The late Chancellor Kent, in reference to the decision in *Taylor v. Porter*, says: 'I apprehend that the decision of the court was founded on just principles, and that taking private property for *private* uses without the consent of the owner is an abuse of the right of eminent domain, and contrary to fundamental and constitutional doctrine in the English and American law (2 Kent Com. 5th ed. note c, 340). But it is insisted, that as the enactment is only held to be void on the ground that it takes private property for private uses against the owner's consent, if the consent be given, all objection on the ground of unconstitutionality is removed. The decisions to which I have referred proceed upon that principle, and Mr. Justice *Bronson*, in *Taylor v. Porter*, in terms, concedes that the objection has no application when the owner consents. If we read the statute in question, with the proviso that the owner consent, and I think we should, that consent removes all obstacles, and lets the statute in to operate the same as if it had in terms contained the condition.'

That such is the *effect of consent*, Sedw. on Stat. and Const. Law, 111, and Mr. Justice *Cooley's* opinion, Const. Lim. 541, note; *Baltimore v. Clunet*, 23 Md. 449, 1865.

That *voluntary acceptance of money*, with knowledge of all the facts, in the absence of fraud or mistake of fact, will estop the party so accepting from afterwards objecting. See *Pursley v. Hays*, 17 Iowa, 310; *Deford v. Mercer*, 24 Iowa, 118; 2 Smith Lead. Cas. (5 Am. Ed.) 662; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 1871; *Commonwealth v. Sherman's Administrators*, 18 Pa. St. 343; *Burns v. Railroad Company*, 9 Wis. 450; *Smith v. Warden*, 19 Pa. St. 426; *Thillate v. Stanley*, 14 Ind. 409, 412; *McGraft v. Brock*, 13 Upper Can. Q. B. 629. *Actual receipt of damages* by party entitled is a waiver of delay in depositing or paying it, and a ratification of the proceedings of the city in laying out the streets for public use. *Hawley v. Harrall*, 19 Conn. 142, 151.

Confirmation of *defective proceedings* by legislative authority. *Yost's*

petent for the legislature to authorize lands to be taken by a municipal corporation for a market, street, or other public use, upon an appraisement and payment of their value to the husband, the holder of the fee, and such taking and payment will confer an absolute title divested of any inchoate right of dower.¹ Nor is a widow *dowable in lands dedicated* by her husband in his lifetime to the public, where the dedication is complete or has been accepted and acted upon by the municipal authorities. Therefore, where the husband agreed to open a street through his property upon which a market-house was to be erected, and which was accordingly erected under an ordinance of the city, his widow was decided not to be entitled to dower in the ground covered by the market-house. The court was of opinion that the case was not to be distinguished from the ordinary one of a condemnation of land to public uses, and that such uses are inconsistent with the existence of private rights which could be enjoyed only by interfering with the rights of the public.²

§ 460. It is agreed that individual property can be compulsory appropriated by the public *only for public use.*³ What is a public use has, in some aspects of the subject, given rise to much controversy, particularly in reference to the delegated exercise of the power by, or for the benefit of, private corporations, companies, and individuals. Since municipal corporations are instituted for public purposes, authority to take property in order to carry out their chartered powers is not often open to the objection that the

Report, 17 Pa. St. 524; *Bennett v. Fisher*, 26 Iowa, 497, 1908; compare, *Baltimore v. Horn*, 26 Md. 194, 1866. *Ante*, sec. 45.

¹ *Moore v. Mayor, &c of New York*, 8 N. Y. (4 Seld.) 110, 1853. *Post*, sec. 498.

² *Gwynne v. Cincinnati*, 3 Ohio, 25, 1827. *Post*, sec. 498.

³ One of the most acute and able American jurists maintains, in an interesting article, that the right to take private property for purposes of utility rests not in public *uses*, but on public *policy*, or the law of *necessity*. Mr. Justice *Campbell*, Vol. I. No. 2, p. 97, Bench and Bar. See, in same publication, Vol. I. No. 1, p. 1, Prof. Washburn's article on "Taxation to Build Railroads," and an able article in *Am. Law Rev.* Oct. 1870. What are "public uses," discussed by Judge *Redfield* in *Allen v. Inhab. of Jay*, 12 Am. Law Reg. (N. S.) 481, 498. *Post*, sec. 587.

use is private and not public. Municipal uses proper are public uses. Highways are conceded to be, and manifestly are, matters of public concern, and hence the condemnation of property for streets, alleys, and public ways is, undeniably, for a public use.¹

§ 461. The mere fact that *individuals have subscribed money*, or given a bond to a city or town, to contribute towards the expense of laying out or altering a street, will not vitiate the proceedings, nor will it prove that the land was taken for the accommodation of private individuals, and not for public uses.² But if such a bond was made the basis of the proceedings,³ or if the street was laid out or widened, "colorably," to use the expression of *Parsons*, C. J., "for the use of the city, but really, for the benefit of the individual" giving or procuring the bond, the proceedings would be set aside.⁴

§ 462. It is an authorized, and frequently wise and just exercise of the right of eminent domain, to empower towns and cities to take, upon compensation being made, private property for the purpose of supplying the inhabitants with *pure water*. This is clearly a public use.⁵

¹ *Per Woodbury, J.*, in *West River Bridge Company v. Dix*, 6 How. (U. S.) 545; Angell on Highways, sec. 86; *Arnold v. Bridge Company*, 1 Duvall (Ky.) 372; *United States v. Bridge Company*, 6 McLean, 517; *Redfield on Railways*, sec. 63.

² *Parks v. Boston*, 8 Pick. 218, 1829. *Copeland v. Packard*, 16 *Ib.* 217. *Ante*, sec. 882.

³ *Ib.*; *Commonwealth v. Sawin*, 2 Pick. 547, 1824; *Freeport v. Bristol*, 9 Pick. 46, 1829.

⁴ *Commonwealth v. Cambridge*, 7 Mass. 166, 167, 1810; *Parks v. Boston*, *supra*; *Crockett v. Boston*, 5 Cush. 183, 190, 1849, where the above cases are commented on. *Ante*, sec. 882.

⁵ *Wayland v. County Commissioners*, 4 Gray, 500, *per Thomas, J.*, 1855; *Burden v. Stein*, 27 Ala. 104, 1855. See *Same v. Same*, 25 *Ib.* 455; *Reddall v. Bryan*, 14 Md. 444, 1859; *Gardner v. Newburg*, 2 Johns. Ch. 162, 1816; *Ham v. Salem*, 10 Mass. 350. In the act to supply the city of New York with pure and wholesome water, the city, under right of eminent domain, was authorized to take private property many miles distant from the corporate limits. Although regarded as going very far, it was not contended that the legislature had exceeded its power. *Mayor, &c. of New York v. Bailey*, 2 Denio, 483, 446, 1845, *per Hand*, Senator. *Post*, sec. 779. In the

§ 463. On the ground that the public health, convenience, and welfare will be thereby promoted, the legislature may authorize the condemnation of private property for the purpose of using the same for a *public park*,¹ or

case of *Kane v. Baltimore*, *infra*, it is held that when property is compulsorily taken by the exercise of the right of eminent domain, for a *specific public use*, as, for example, supplying the city with water, the city is limited to such use, all other rights not interfering therewith being left with the owner. It was not denied, however, that the power to condemn, in *fee simple*, might, if necessary to carry out the public end designed, be conferred by the legislature. *Kane v. Baltimore*, 15 Md. 240, 1859, *Tuck, J.*, dissenting.

It is not within the corporate powers of a city to open streets on *lands* within the corporate limits, *belonging to the United States*, and which have never been sold to private persons. *United States v. Chicago*, 7 How. (U. S.) 185. Private property, it was admitted by the Maryland Court of Appeals, can only be taken for "*public use*;" but the words "*public use*" were considered to mean not merely a use by the state or the inhabitants thereof, but embrace a use for the government of the United States; and therefore, a statute of the state of Maryland, authorizing the expropriation of land in that state, for the purpose of supplying the city of Washington with water, was held constitutional. *Reddall v. Bryan*, 14 Md. 444, 1859. See, on this subject, *Cooley Const. Lim.* 525, 526, and note; *Gilmer v. Lime Point*, 18 Cal. 229; 19 *Id.* 47. So in Massachusetts it has been recently determined that a state may consent that the United States may compulsorily take and hold land for the site of a post office and public treasury. *Burt v. Merchants' Insurance Company*, 106 Mass. 356, 1871. The Supreme Court of Michigan, however, has decided that a state cannot condemn private property with a view to turn the same over to the United States for lighthouse purposes. *Trombley v. Humphrey*, 23 Mich. 471, 1871.

¹ *Central Park Extension* (matter of), 16 Abb. Pr. 56; *Park Commissioners v. Williams*, 51 Ill. 57. The legislature may authorize the condemnation of the fee for a public park, and the title of a city corporation to lands thus acquired is clothed with a trust to hold them for this specific purpose, but the legislature may (where there is no contract with creditors which will be thereby impaired) relieve the city from the trust and authorize a sale of the lands discharged therefrom. There is no contract in such cases with the owners of adjacent property. *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 1871. *Infra*, sec. 464, note; *post*, sec. 513.

As to the *uses* of a public park, see opinion of *Folger*, J. 45 N. Y. 240. *Post*, sec. 510, note.

In the recent and yet unreported case of the *State v. Leffingwell, et. al.*, March Term, 1873, the Supreme Court of Missouri held the act of March 25, 1872, establishing for the city of St. Louis, and outside of the city, what is known as the Forest Park, to be unconstitutional. The park com-

public square,¹ or for the construction of *drains* and *sewers*.² So, for the same reasons, a municipal corporation may be designated as the public agency to "purchase or otherwise take lands," within a large district, on compensation being made, in order to *raise and drain* them so as to abate an existing nuisance thereon.³

missioners were created a body corporate with power to purchase and to condemn lands for the park, and to issue \$1,200,000 of bonds to be secured on the lands purchased and condemned. A park district was laid off, comprising lands surrounding the park within a designated district, and provision was made for the levy and collection for twenty years of a special tax on all lands within this district to pay the principal and interest of the park bonds. The act was held invalid on two grounds: 1. It infringed the constitutional provision, "Corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes; no municipal corporations, except cities, shall be created by special act." The park act was decided to be a special act and to create a corporation other than municipal. 2. It was invalid because it levied a special tax or local assessment exclusively upon certain designated lands *outside* of the city, for an object general in its nature and which the act declared to be of great importance to the city of St. Louis, conducive to its dignity and character and to the health and recreation of its inhabitants. The remarks of *Wagner, J.*, on the abuses of local assessments are very emphatic, and, in view of the case before the court, very just. He concludes by saying, "The constitution has wisely erected a barrier against this exorbitant power, and there is a time in the tide of this special taxation when it must be said, 'thus far shalt thou go, and no further.'" *As to local assessments, see post, chap. XIX.*

¹ *Owners, &c. v. Albany*, 15 Wend. 374, 1836. In this case, the legislature authorized the condemnation of property for a *public square* in the city of Albany, and required the damages to the land owners whose property was taken to be apportioned amongst the owners of the ground to be benefited. The Court sustained the validity of the enactment, and held that the taking of ground for such a purpose was as much a public use as if taken for a street, and that the mode of compensation (by an assessment of benefits instead of a general tax) was unimportant, and no evidence that the use is not a public one.

² *Hildreth v. Lowell*, 11 Gray, 345.

³ *Dingley v. Boston*, 100 Mass. 544, 1868. *Supra*, sec. 456; *Draining Company Case*, 11 La. An. 338. In *Reeves v. Treasurer of Wood County*, 8 Ohio St. 333, 345, 1858, a law, authorizing an entry upon private property, and the construction of drains when demanded by private and not by public interest, was adjudged void. Approving: *Matter of Albany Street*, 11 Wend. 149; *Bloodgood v. Railroad Company*, 18 Wend. 9, 59; *Varick v. Smith*, 5 Paige, 137; *Sedgwick on Const. Law*, 514, 515. See, also, *Cooley*

§ 464. It has been said since public necessity is the *basis* of the right of eminent domain, that the right cannot be exercised except where the purpose is *useful*; and therefore, that property cannot be compulsorily acquired against the owner's consent when wanted merely for *ornamental* purposes.¹ Chancellor Kent,¹ referring to the

Const. Lim. 533; *People v. Nearing*, 27 N. Y. 306; *Anderson v. Draining Company*, 14 Ind. 199; *Talbot v. Hudson*, 16 Gray, 417.

¹ Angell on Highways, sec. 85; Smith Commentaries on Stat. and Const. Law, sec. 835. By the Supreme Court of Vermont it is said that highways and streets cannot be laid out for the mere purpose, or mainly, for the purpose of *embellishing and ornamenting* the grounds about a public building, but that these results may be taken into consideration, in connection with the public convenience and necessity; if the latter exist, the resulting incidental embellishment will not render the establishment of the highway or street illegal. *Woodstock v. Gallup*, 28 Vt. (3 Wms.) 537, 1856; S. C., 29 *Id.* 347. See, on the general subject, the opinion of *Woodbury, J.*, in *West River Bridge Company v. Dix*, 6 How. 545, where the subject of eminent domain is ably examined. In the case last referred to this learned Judge, in the course of his opinion, observes: "When we go to other public uses, not so urgent, not connected with precise localities, not difficult to be provided for without the power of eminent domain, and in places where it would be only convenient, but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for public use, for a marine hospital or state prison? So a custom house is a public use for the general government, and a court house or jail for a state. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. No necessity seems to exist, which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence; while as to light-house, or fort, or wharf, or highway between certain termini, it may be very important and imperative. I am aware of no precedents, also, for such seizures of private property abroad, for objects like the former, though some such doctrines appear to have advanced in this country." See, also, *Boston Mill Corporation v. Newman*, 12 Pick. 476; *Cooley Const. Lim.* 531, 533; *Dunn v. Charleston*, *Harper* (S. C.) Law, 189, 1824; *Bankhead v. Brown*, 25 Iowa, 540; *Eldridge v. Smith*, 34 Vt. 484.

The legislature incorporated the "Memphis Freight Company," giving to it "the privilege of loading and unloading freight, goods, and other property on boats that may touch at the port of Memphis; of erecting on the bank of the Mississippi river, in the city of Memphis, such sheds, railroad tracks, engines, and their equipments, as may be necessary for hauling freight;" no right was given to the public to use the property or privileges

¹ *Gardner v. Newburg*, 2 Johns. Ch. 162, 166, 1816.

opinions of continental jurists on the subject of eminent domain, observes that Bynkershoeck¹ "insists that private property cannot be taken, *on any terms*, without the consent of the owner, for purposes of *public ornament or pleasure*; and he mentions an instance in which the Roman Senate refused to allow the prætors to carry an aqueduct through the farm of an individual, against his consent, when intended merely for ornament." If it be admitted or shown in any given case that the ornamental purpose is not associated with any useful purpose it would seem to be true that it is inconsistent with the respect in which all enlightened governments hold private property, to say that it can be compulsorily taken from the owner. Such a use is not, within the meaning of the American Constitutions, a legitimate "*public use*." But if land for public squares and parks, which are largely, though not exclusively, for ornament, may be assumed by the state, upon payment to the owner, it would be difficult to hold an act unconstitutional which authorized the condemnation of land for a public fountain, or as a site for a monument. These questions, however, lie upon the boundary of legislative power, and have not been very fully illustrated by actual adjudications.*

given to the company, and no right of legislative regulation of tolls was reserved. It was held that this company organized for private advantage and profit, could not be invested with the right to condemn property, against the owner's consent, to lay down a railroad track from the streets of the city to the margin of the river, for the reason that the use was not a public use, within the meaning of the constitution. It will be noticed that "The Promenade," over which the right of way was sought, is treated by the case as the private property of the city of Memphis. There is, however, no discussion of the question as to the legislative power over property thus dedicated. *Memphis Freight Company v. Memphis*, 4 Coldw. (Tenn.) 419. 1867.

¹ Bynkershoeck, *Quæst. Jur. Pub.* b. 2, ch. 15.

* An interesting illustration of the subject discussed in the text is afforded by the somewhat singular case of *Higginson et al. v. Nahant*, 11 Allen, 530, 1866. In Massachusetts the usual constitutional provision exists that the property of individuals can only be appropriated to public uses when the public exigencies require it; and the doctrine has been asserted therein that public ways are for travel and not for places of amusement. *Blodgett v. Boston*, 8 Allen 237; *post*, sec. 786. The proper authorities of the town

§ 465. Of the *necessity or expediency* of exercising the right of eminent domain in the appropriation of private property to public uses, the opinion of the legislature, or of the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such a question is essentially political in its nature, and not judicial.¹ But the question whether the specified use is a public use or purpose, or such use or purpose as will justify or sustain the compulsory taking of

in due form laid out a town way, and the above-mentioned case of *Higginson et al. v. Nahant* presented the question whether the proceedings to establish it could be impeached by showing that the way was wholly upon the land of the plaintiffs; that it entered their land from a highway and returned to it near the place at which it entered; that it led to no other way or landing place, and could be used for no purposes of business or duty, or of access to the lands of any other person; but that it was laid out by the selectmen of the town with the design to provide access, not for the town merely, but for the public, to points or places in the lands of the plaintiffs which presented pleasing natural scenery. The court sustained the validity of the proceedings to establish the road. The substance of its reasoning is that the only true test is whether the road is wanted for public travel; that whether wanted for this purpose is a question not committed by the legislature to the determination of the courts, but to the local authorities, and that where there is a sufficient amount of travel to warrant the construction of a particular road the courts cannot enter upon an inquiry as to the reasons which may induce people to travel upon it. It is sufficient if they wish to travel upon it for any innocent and lawful purpose, whether for business, or duty, or pleasure. "The passing from place to place," says Mr. Justice *Howe*, who gave the opinion of the court, "is a rightful object of public provision in itself; and the occasions for it are as extensive as the pursuits of life. Pleasure travel may be accommodated as well as business travel. If the doctrine for which the plaintiffs contend were supported, it would also follow that the legislature would not have the constitutional right to take private property for a public park or pleasure ground, making full compensation to the owner,—a conclusion which we should hesitate to arrive at without much farther consideration, in view of the important relations which air, exercise, and recreation bear to the general health and welfare of the community." Since the making of provision for opening public ways is confessedly a legislative duty, and such an object a public one (*ante*, secs. 105a, 460), this case, it is evident, does not hold that it would be lawful compulsorily to acquire private property for mere purposes of pleasure dissociated from purposes of utility.

¹ *People v. Smith*, 21 N. Y. 597; *Giesy v. Railroad Company*, 4 Ohio St. 308; *Varick v. Smith*, 5 Paige, 187; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 284. 1871.

private property, is, perhaps, ultimately a judicial one, and, if so, the courts cannot be absolutely concluded by the action or opinion of the legislative department. But if the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably private, or the necessity for the taking plainly without reasonable foundation.¹ But if the use is public, or if it be so doubtful that the courts cannot pronounce it not to be such as to justify the compulsory taking of private property, the decision of the legislature, embodied in the enactment giving the power, that a necessity exists to take the property, is final and conclusive.²

§ 466. In exercising the power of eminent domain, the city council need not preface their laying out of a highway or street by declaring that they find the same to be necessary or expedient. This *necessity is sufficiently implied in their action* on the subject, inasmuch as they can act only in such a case. They need not record their motives where

¹ Commonwealth v. Breed, 4 Pick. 463; Hazen v. Essex County, 12 Cush. 477; Bankhead v. Brown, 25 Iowa, 540; Hanson v. Vernon, 27 Iowa, 28; Concord Railroad v. Greely, 17 N. H. 47; 2 Kent Com. 340; Memphis Freight Company v. Memphis, 4 Coldw. (Tenn.) 419, 1867; Taylor v. Porter, 4 Hill (N. Y.) 142; Cooley Const. Lim. 530, *et seq.* Speaking of this subject, Shaw, C. J., says: "It is contended that if this act was intended to authorize the defendant company to take the mill power and mill of the plaintiff, it was void, because it was *not taken for public use*, and it was not within the power of the government in the exercise of the right of eminent domain. This is the main question. In determining it, we must look to the declared purposes of the act; and if a public use is declared, it will be so held, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use." Hazen v. Essex County, *supra*. *Infra*, sec. 468. Consult on this subject opinion of Appleton, C. J., in Allen v. Inhabitants of Jay, 12 Am. Law Reg. N. S. 481, 1871, and note by Judge Redfield.

² See authorities last cited; Talbot v. Hudson, 16 Gray (Mass.) 417. The language of the text of this section is guarded, and the view there intimated is the safe and, perhaps, the sound one. The citizen is more secure in his rights where the ultimate decision respecting the *use or right to take* is left to deliberate, unimpassioned, and conservative judgment of the courts; but if the power of eminent domain rests alone upon the basis of the public necessities or of public policy, it seems somewhat difficult to maintain that the legislative determination of this question is not conclusive.

they have jurisdiction to act. It might be otherwise, were their jurisdiction made to depend upon their first finding a preliminary fact to be true.¹

§ 467. The legislature, instead of directly exercising the power to take private property for public use, *may delegate it*, attended, however, by its constitutional restrictions, to private corporations organized for public purposes, and of course, therefore, to municipal corporations, which are, for all purposes of local government, essentially public in their nature and ends; and it may, also, confer upon them the right to decide upon the existence of the necessity for its exercise. Thus a municipal corporation may be constitutionally invested with the power to open and establish, by compulsory acquisition or by purchase, such streets as its council may judge expedient or necessary.²

§ 468. Whether the power be exercised directly by the legislature, or mediately through municipal corporations or other public agencies, the *purpose or use* for which private property is authorized to be appropriated *should be specified* by the legislature, and the power will not be enlarged

¹ *Townsend v. Hoyle*, 20 Conn. 1, 9, 1849, *per Ellsworth, J.* A finding, by the city authorities, that "public convenience requires" the laying out of a street, is equivalent to finding that it is "necessary" in the sense of the statute. *Hunter v. Newport*, 5 Rh. Is. 325; *Watson v. South Kingston*, 1*b.* 562. See chapter on Ordinances, *ante*, sec. 252.

² *People v. Smith*, 21 N. Y. 595, 1860; *Wilson v. Marsh County*, 2 Pet. 251; *Bloodgood v. Railroad Company*, 18 Wend. 9; *West River Bridge Company v. Dix*, 6 How. 183; *Mercer v. Railroad Company*, 36 Pa. St. 99; *Commonwealth v. Charleston*, 1 Pick. 180; *Scudder v. Trenton, &c. Falls Co.*, Saxt. (N. J.) 694; *Harbeck v. Toledo*, 11 Ohio St. 219; *Shaffner v. St. Louis*, 31 Mo. 264; *Swan v. Williams*, 2 Mich. 427; *Embury v. Conner*, 3 Comst. 511, 1850; *Alexander v. Baltimore*, 5 Gill, 383; *Sedgw. on Stat. and Const. Law*, 517. *Ante*, sec. 23. The expediency of exercising the power usually given to open streets is generally left solely to the judgment of the governing body of the corporation. *Curry v. Mt. Sterling*, 15 Ill. 820, 1853. Power may be delegated to local authorities to determine the expediency of building a bridge over a creek. *Commonwealth v. Charlestown*, 1 Pick. 180. Streets may be established by direct action of the legislature, as by ordering a survey of a town to be made, and declaring the map to be a public record. Such streets are public highways without being formally opened or used. *West v. Blake*, 4 Blackf. (Ind.) 234, 1836.

by doubtful construction.¹ Therefore, authority to a city corporation to appropriate private property for streets, lanes, alleys, and public squares or grounds, does not confer the power, compulsorily, to take private property upon which to erect a city prison.² So where the purpose for which land is to be taken is as well met by construing the authority to warrant the taking of an easement only as of the fee, the grant, if doubtful, will be construed most favorably for the citizen.³

§ 469. Not only must the authority to municipal corporations, or other delegated legislative agents, to take private property, be expressly conferred, and the use for which it is taken specified, but *the power*, with all constitutional and statutory limitations and directions for its exercise, *must be strictly pursued*. Since the power to condemn private property against the will of the owner is a stringent and extraordinary one, based upon public necessity or an urgent public policy, the rule requiring the power to be strictly construed, and the prescribed mode for its exercise strictly followed, is a just one, and should, within all reasonable limits, be inflexibly adhered to and applied.⁴

¹ Claiborne Street (matter of), 4 La. An. 7; Exchange Alley (matter of), 4 La. An. 4; East St. Louis v. St. John, 47 Ill. 463, 1868; Cooley Const. Lim. 530, 541; Kane v. Baltimore, 15 Md. 240, 1859. In proceedings to open streets, the costs thereof cannot, unless the right to do so be expressly or plainly given by the statute, be added to the damages and collected from the owners of the adjacent property. The words, "the expenses of said improvement," do not embrace the costs of the proceedings. In the absence of authority to collect the same from adjacent owners, the costs must be borne by the corporation. Morris v. Chicago, 11 Ill. 650, 1850; S. P. Trustees v. Chicago, 12 Ib. 403. See Street Case, 10 La. An. 313. Post, sec. 607.

² East St. Louis v. St. John, *supra*. It would seem to be the opinion of Mr. Justice Woodbury, that private property could not be compulsorily taken for such a purpose, if the legislature had undertaken to grant the power. He says: "Who ever heard of laws to condemn private property for public use for a marine hospital or state prison?" West River Bridge Company v. Dix, 6 How. (U. S.) 545. Ante, sec. 464.

³ Edgerton v. Huff, 26 Ind. 35. See Heyneman v. Blake, 19 Cal. 579; Kane v. Baltimore, 15 Md. 240.

⁴ Shaffner v. St. Louis, 31 Mo. 264, 1860; Mayor, &c. v. Long, Ib. 369; Specht v. Detroit, 20 Mich. 168, 1870; Trumpler v. Bemerly, 39 Cal. 490;

§ 470. Especially will the courts require a *strict compliance with all conditions precedent* to the exercise of the power, and all provisions as to the manner of its exercise intended for the benefit and protection of the citizen. If the authority be not thus pursued, the proceedings will not have the effect to divest the owner of his property.¹ If defective in respect to jurisdictional requisites, they will be void; if irregular, simply, they will be set aside by the courts on *certiorari* or such other remedy as may be deemed appropriate in the particular state.² Not only so, but a municipal corporation claiming title to streets or other public property, by virtue of proceedings under the exercise of the right of eminent domain, must show affirmatively that the requirements of the statute have been complied with. Thus, if under the statute or charter, the *disagreement* of the parties as to the amount of the compensation, is an essential prerequisite of the right of the city compulsorily to appropriate private property, this fact must be shown by the city.³

Leslie v. St. Louis, 47 Mo. 474, 1871; Anderson v. St. Louis, *Id.* 479; Harbeck v. Toledo, 11 Ohio St. St. 219, 1860; Dyckman v. Mayor, &c. of New York, 1 Seld. 439; State v. Jersey City, 1 Dutch. (N. J.) 309, 1855; Cincinnati v. Combs, 16 Ohio, 181, 1847; Mitchell v. Kirtland, 7 Conn. 229; *Id.* 850; Nichols v. Bridgeport, 23 Conn. 189, 208, 1854; Judson v. Bridgeport, 25 Conn. 426; Van Winkle v. Railroad Company, 2 Green (N. J.) 162, 1838; Adams v. Railroad Company, 10 N. Y. 328; Cooley Const. Lim. 528, 541; People v. Brighton, 20 Mich. 57; Kidder v. Peoria, 29 Ill. 77, 1862; Exchange Alley (matter of), 4 La. An. 4; Claiborne Street (matter of), *Id.* 7; Thompson v. Schermerhorn, 2 Seld. 92; Burnett v. Buffalo, 17 N. Y. 383; Hunt v. Utica, 18 N. Y. 442; Kyle v. Malin, 8 Ind. 34, 37; Redfield on Railways, sec. 64; People v. Railroad Company, Ill. Sup. Ct. April, 1872. "It is a well established rule, that in matters of expropriation to public use, all the forms of law must be rigidly observed." Street Case, 16 La. An. 393, 1861; Dennis v. Hughes, 8 Upper Can. Q. B. 444.

¹ See authorities last cited. *Post*, sec. 605.

² Harbeck v. Toledo, 11 Ohio St. 219; Parks v. Boston, 8 Pick. 218; Shaffner v. St. Louis, 31 Mo. 264; Baltimore v. Eschback, 18 Md. 276; Welker v. Potter, 18 Ohio St. 85. *Post*, chap. XXII.

³ Dyckman v. Mayor, &c. of New York, 1 Seld. 434, 1851, a fully considered case, arising out of the condemnation of the plaintiff's land for the Croton Water Works. If, however, the owner appears, in the proceedings, to assess his damages, and contests the amount, without objecting that no effort had been made to agree, the court (it was held) will presume it to

§ 471. So *notice* of the proceedings to take property for public use is, when required to be given, the basis of jurisdiction or of the right to proceed, and if not given, or if not given in the required manner, the proceedings are unauthorized and void.¹ It is, however, competent for the legislature, in the absence of special constitutional restriction, to provide for constructive notice only to those interested.²

have been made. *Reitenbaugh v. Railroad Company*, 21 Pa. St. 100. As to failure to agree with owner, see, also, *Railroad Company v. Porter*, 29 Pa. St. 165; *Neal v. Railroad Company*, 2 Grant (Pa.) Cases, 137; *Doughty v. Railroad Company*, 1 Zab. 442; *Gilmer v. Lime Point*, 19 Cal. 47. The incapacity of the landowner to sell is a sufficient refusal to sell within the Massachusetts act of 1866. *Balch v. Co. Commissioners*, 103 Mass. 106. Effort and failure to agree held not a condition precedent. *Bigelow v. Railroad Company*, 2 Head, 624. How the fact of the attempt to agree, and its failure, may be shown, *vide* opinions of *Foot* and *Gardiner, JJ.*, in *Dyckman v. Mayor &c. supra*. See, also, as principle in text, *Sharp v. Spier*, 4 Hill, 76; *Sharp v. Johnson*, *Ib.* 92; *Nichols v. Bridgeport*, 23 Conn. 189. That owner may waive constitutional or statutory provisions for his benefit—effect of receipt of payment—powers and nature of jurisdiction of Supreme Court as to confirmation (under statute) of reports of commissioners—and that title passes by *force of the statute and payment*, see *Embury v. Conner*, 3 Comst. 511; *Ib.* 187; *Arnot v. McClure*, 4 Denio, 45; *Striker v. Kelly*, 7 Hill, 9; S. C., in error, 2 Denio, 328; *Doughty v. Hope*, 3 Denio, 249; *Kennedy v. Newman*, 1 Sandf. 187.

¹ *Harbeck v. Toledo*, 11 Ohio St. 219, 1860; *Specht v. Detroit*, 20 Mich. 168, 1870; *Kidder v. Peoria*, 29 Ill. 17, 1862; *Baltimore v. Bouldin*, 23 Md. 328, 1865; *McMicken v. Cincinnati*, 4 Ohio St. 394; *Molett v. Keenan*, 22 Ala. 484; *Darlington v. Commonwealth*, 41 Pa. St. 68; *Nichols v. Bridgeport*, 23 Conn. 189. As to notice and its requisites, see, also, *Redfield on Railways*, sec. 72. Waiver of notice: *Cruger v. Railroad Company*, 12 N. Y. 190. As to notice in similar cases: *Myrick v. La Crosse*, 17 Wis. 442; *Rathbun v. Acker*, 18 Barb. 393; *Risley v. St. Louis*, 34 Mo. 404; *Welker v. Potter*, 18 Ohio St. 85; compare *Furnell v. Cotes*, 19 Ohio St. 405; *Cowen v. West Troy*, 43 Barb. 48; *State v. Hudson*, 5 Dutch. (N. J.) 475; *Specht v. Detroit*, 20 Mich. 168, 1870.

² *Stewart v. Board, &c.*, 25 Miss. 479; *Palmyra v. Morton*, 25 Mo. 598, 597; *Swan v. Williams*, 2 Mich. 427. The publication of the ordinance which authorizes the opening of the street is frequently the only notice to property owners which is required by the charter or constituent act of the corporation. *Curry v. Mt. Sterling*, 15 Ill. 220, 1853; *Joliet v. Railroad Company*, 23 Ill. 202. Where notice of the proceedings to open streets is required to be given by publication only, and it is thus given, "the law imputes notice, and will not admit testimony to disprove it;" and in such

So where the charter, by a fair construction, provided that *each* applicant for a review of an assessment should himself have the right to select two appraisers, an ordinance denying this right and giving it to a majority of those to be affected by the laying out of a street, is void.¹ So authority to *open* a street and assess the damages on the property benefited, does not give the power to assess for anything more than opening the street and paying for the right of way; it does not include the power to assess other property for the *improvement* of the street by grading, culverting, and the like.²

§ 472. So if *damages* are to be assessed by *commissioners who are freeholders*, the fact that they are such should, it has been held, appear on the face of the proceedings.³ But where the charter required the city council to appoint as commissioners disinterested freeholders residing in the city, and the corporation, in a proceeding *against it* by the land owner for a *mandamus* to compel it to collect the amount awarded, admitted that its council had appointed the commissioners, it was held as against the city that the commissioners would be presumed to possess the requisite qualification, the contrary not appearing on the face of the proceedings.⁴

§ 473. Under the language by which the power to open streets and to take private property for that purpose is usually conferred upon municipal corporations, they may,

cases want of actual notice in any part is no ground for relief, in equity or otherwise, against such proceedings. *Methodist Protestant Church v. Baltimore*, 6 Gill (Md.) 391, 1848. See *State v. Jersey City*, 4 Zab. 662; *Dubouque v. Worten*, 28 Iowa, 571. *Post*, chap. XIX. sec. 648.

¹ *Cincinnati v. Coombs*, 16 Ohio, 181, 1847, and see *Ib.* 574.

² *Reed v. Toledo*, 18 Ohio, 161, 1849. "Opening" street defined. *Ib.* *Post*, chapter on Taxation and Local Assessments.

³ *Nichols v. Bridgeport*, 28 Conn. 189, 208, 1854. If not thus appearing, the proceedings will be held void. *Ib.* See, also, *Judson v. Bridgeport*, 25 Conn. 426; *Griffin v. Rising*, 2 Cush. 75; *People v. Brighton*, 20 Mich. 57, 1870.

⁴ *State v. Keokuk*, 9 Iowa, 438, 1859. See *Higgins v. Chicago*, 18 Ill. 276; *Chicago v. Wheeler*, 25 Ill. 478. A provision in a charter that plans for opening streets shall be recorded in the recorder's office, is directory.

at any time *before* taking possession of the property under completed proceedings, or before the final confirmation, recede from or *discontinue the proceedings* they have instituted. This may be done, unless it is otherwise provided by legislative enactment, at any time before vested rights in others have attached. Until the assessments of damages have been made, the amount cannot be known, and it is reasonable that after having ascertained the expense of the project the corporation should have a discretion to go on with it or not, as it sees fit.¹

Sower v. Philadelphia, 35 Pa. St. 281. An order laying out a street or highway may refer to a "plan," in which case the plan meant may be shown and identified by evidence *aliunde*, and used to prove the location and limits of the highway. *Stone v. Cambridge*, 6 Cush. 270, 1850. *Sufficiency of description of proposed street*: *Stewart v. Baltimore*, 7 Md. 500.

As to *modes of procedure*, and various points of practice respecting the assessment of damages, see Redfield on Railways, sec. 72, where many of the cases are referred to and stated.

¹ *Anthony Street*, 20 Wend. 618, 619, and prior cases in New York there cited; *Martin v. Mayor, &c. of Brooklyn*, 1 Hill (N. Y.) 541, 1841; *In re Dover Street*, 18 Johns. 506; *Millard v. Lafayette*, 5 La. An. 112, 1850; *Roffignac Street (matter of)*, 4 Rob. (La.) 357; *Canal Street (matter of)*, 11 Wend. 155; *McLaughlin v. Municipality*, 5 La. An. 504; *St. Joseph v. Hamilton*, 43 Mo. 282; *State v. Hug*, 44 Mo. 116; *Hullin v. Municipality*, 4 Rob. (La.) 357; *S. C.*, 11 *Id.* 97, 1845; *Water Commissioners of Jersey City*, 31 N. J. (2 Vroom) 72, 1864; *Clough v. Unity*, 18 N. H. 75; *Pillsbury v. Springfield*, 16 N. H. 565; *Higgins v. Chicago*, 18 Ill. 276; *State v. Graves*, 19 Md. 351, 1862, where the subject is well discussed by *Bowie, C. J.* After verdict and judgment in favor of the land owner (*Hawkins v. Rochester*, 1 Wend. 54), or after confirmation of the report, private rights attach, and the corporation cannot discontinue the proceedings, although the court may refuse a *mandamus* and leave the parties to their remedy, by action. *People v. Brooklyn*, 1 Wend. 318, and cases cited; *In re Dover Street*, *supra*; *Duncan v. Louisville*, 8 Bush (Ky.) 98, 1871. A city "may revoke ordinances establishing new streets before they are opened, if, in the exercise of its discretion, it ascertains that the opening of them would be injurious to the public interest; provided, however, that no vested right acquired under the dedication is affected by the change." *Per Rost, J.*, *Municipality v. Levee Company*, 7 La. An. 270, 1852. The author does not understand the case of the *State v. Keokuk* (9 Iowa, 438, 1859), to deny, but rather to affirm, the power of the city to abandon the project of opening of a street any time before the property is taken; but the case holds that the city, *while proceeding* with the work, has no *implied power* to set aside the report of commissioners it had appointed, and to appoint new ones at discretion, "until the damages are brought to square" with its views. On this ground

§ 474. Where proceedings are rightfully discontinued, the land owner cannot have a *mandamus to collect, nor recover by action*, the sum that may have been estimated by commissioners; yet he may have a special action for damages for any wrongful and injurious acts of the corporation in the course of the proceedings.¹ And it has been even held that if the municipality deems it best to abandon the proposed work or project, it may do so, and discontinue proceedings, although it may have taken possession of the premises. By taking such possession, it is argued, the corporation does not impliedly agree to purchase at the appraisement. It may, nevertheless, discontinue the proceedings, and the land owner can only demand the premises, and damages for being deprived of them, and for injuries thereto.²

§ 475. Nor has the municipal corporation always been

the case is sustainable, and in accordance with settled principles and sound reason. It is not to be taken as holding that the land owner has a vested right to an assessment simply because one has been made. Power to set aside report and appoint new board, see Redfield on Railways, sec. 72, and notes. Assessment made by commission must be approved or rejected by the court *in toto*; it cannot amend the report. Matter of Claiborne Street, 4 La. An. 7; Matter of Anthony Street, 20 Wend. 618; Simmons v. Mumford, 2 Rh. Is. 172; Clarke v. Newport, 5 Rh. Is. 333. Where a city has accepted and confirmed the report of commissioners to assess damages, it is concluded from withholding payment because of an alleged error. Higgins v. Chicago, 18 Ill. 276; Chicago v. Wheeler, 25 Ill. 478. Mandamus to enforce payment by sale of city bonds. Duncan v. Louisville, 8 Bush (Ky.) 97, 1871.

¹ State v. Graves, 19 Md. 351, 1862; Milliard v. Lafayette, 5 La. Ann. 112, 1850; Roffignac Street, 4 Rob. (La.) 357; Canal Street, 11 Wend. (N. Y.) 155; Anthony Street, 20 Wend. 618; Walling v. Mayor, 5 La. An. 660. Where a corporation commences proceedings to open a street, and notifies a proprietor not to continue the making of improvements he had begun, and the corporation needlessly delays and finally abandons the proceedings, it is, under these circumstances, liable for the actual damages suffered by the proprietor, arising from the suspension of his improvements. McLaughlin v. Municipality, 5 La. An. 504, 1850, distinguished from Millard v. Lafayette, *Id.* 112; Graff v. Baltimore, 10 Md. 544, 1857. Mandamus held to be the remedy of the abutter for delay in completing street improvements. Whiting v. Boston, 106 Mass. 89, 1870. Such delay is no legal excuse for refusal to pay assessment. *Id.*

² Hullen v. Municipality, 11 Rob. (La.) 97, 1845.

considered as concluded and bound to pay the damages awarded, although the report of the commissioners appointed by it had been confirmed. The act to enable the city of Baltimore to procure a supply of water authorized the city to condemn lands, required the inquisition of damages to be returned to the circuit court, and provided that it "should be confirmed by the said court at its next sitting, if no sufficient cause to the contrary be shown," and the "valuation when paid or tendered shall entitle the city to use the land as fully as if it had been conveyed by the owner." It was held that the city was not bound by the mere inquisition of damages, although *confirmed* by the court, to pay the amount awarded, but could, nevertheless, *abandon* the location in question; that the judgment of confirmation simply decided the value of the land, and that payment or tender of the valuation is necessary to give the city a title to the property. It was admitted by the court, however, that if the owner suffered loss or injury by reason of the wrongful acts of the city, he might recover damages therefor.¹ But the language of the act or charter may be such as to give the land owner a right to the sum assessed, and to prevent the corporation from setting aside or discontinuing proceedings, as where it is provided "that after the value and damages shall have been ascertained, the amount, with interest, shall be paid to the person interested, on demand."²

§ 476. If no *appeal or other special remedy* be given, it has been very generally held that *certiorari* lies against a town or city corporation with respect to their proceedings in laying out, altering, or improving a street, and if invalid they will be set aside by the courts.³ Adopting what it

¹ *Graff v. Baltimore*, 10 Md. 544, 1857, approving *Railroad Company v. Nesbit*, 10 How. (U. S.) 395. See, also, as to private rights vesting, *State v. Clunet*, 19 Md. 851, 1862.

² *Stafford v. Albany*, 7 Johns. 541, 1811; S. C., 6 *Id.* 1.

³ See, *post*, chap. XXII.; *ante*, sec. 368. Also, *State v. Wakely*, 2 Nott & McCord, 410, 1820; *State v. Cockrell*, 2 Rich. Law, 6; *Parks v. Boston*, 8 Pick. 218, 1829; *Preble v. Portland*, 45 Maine, 241, 1858; *Stone v. Boston*, 2 Met. 220; *Prigden v. Bannerman*, 8 Jones (N. C.) 58; *Baldwin v. Bangor*, 86 Maine, 518; *Gay v. Bradstreet*, 89 Maine, 580; *Dwight v. Springfield*, 4

regarded as the well established general doctrine, the Supreme Court of the United States have held that the federal circuit courts, sitting in equity, will not interfere, by injunction, or otherwise, with the proceedings and determinations of the municipal authorities in exercising the power to open streets, unless it becomes necessary, to prevent a multiplicity of suits, or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be proved by extrinsic evidence. There must be some recognized ground of equity jurisdiction, or equity will not interfere. If the proceedings are void, and do not cast a cloud upon the owner's title, he must resort to the ordinary legal remedies. If the municipal authorities have failed to follow the provisions of the charter, or have exceeded the jurisdiction which it confers, the remedy of the land owner for the

Gray, 107, 1855; *Kingman v. County Commissioners*, 6 Cush. 306; *French v. Commissioners*, 12 Mich. 267; *Inhabitants of Monterey v. County Commissioners*, 7 Cush. 394; *Intendant v. Chandler*, 6 Ala. 899, 1844; *Ruhlman v. Commonwealth*, 5 Binn. 26; *Ex parte Tarlton*, 2 Ala. 35, 1841; *Swan v. Cumberland*, 8 Gill (Md.) 150, 1849; *Camden v. Mulford*, 2 Dutch. (N. J.) 49; *Dorchester v. Wentworth*, 11 Fost. (N. H.) 451; *State v. Stewart*, 5 Strob. (S. C.) Law, 29; *State v. Swift*, 1 Hill (S. C.) 360; *Myers v. Simms*, 4 Iowa, 500; *McCrary v. Griswold*, 7 Iowa, 248; *Spray v. Thompson*, 9 Iowa, 500; *Campau v. Detroit*, 14 Mich. 276, 1866; *Duffield v. Detroit*, 15 Mich. 474. As to function of appeal and *certiorari*. *People v. Brighton*, 20 Mich. 57. *Post*, secs. 739-748.

So in Vermont it is held that the proceedings by the county court to lay out roads are not by the course of the common law, and can only be revised upon *certiorari*, or by writ of *mandamus* in the nature of a *procedendo*. *Adams v. Newfane*, 8 Vt. 271; *Lyman v. Burlington*, 22 *Id.* 181; *Woodstock v. Gallup*, 28 Vt. (2 Wms.) 587, 1856, where *Redfield*, C. J., very fully considers the proper office of writs of *certiorari* and *mandamus* in the nature of a *procedendo*. The latter was deemed the more appropriate remedy where the inferior tribunal disposed of the case upon an incidental question, and not upon the merits. See *Rand v. Townsend*, 26 Vt. 670. When remedy of abutter is by *certiorari*, and when in equity. See, further, *Whiting v. Boston*, 106 Mass. 89; *Jones v. Boston*, 104 Mass. 461. *Post*, secs. 727-738. It is held in New York (*People v. Mayor*, 2 Hill, 9, 1841,) and Ohio (*Dixon v. Cincinnati*, 14 Ohio, 240, 1846) that *certiorari* will not lie in such cases unless given by statute, but the cases above referred to will show that the opposite opinion has been very generally adopted. See *People v. Stillwell*, 19 N. Y. 531.

review and correction of the proceedings is by *certiorari*, and not by bill in equity.¹

¹ *Ewing v. St. Louis*, 5 Wall. 418, 1866; *Hannewinkle v. Georgetown*, U. S. Sup. Court, December Term, 1872. In case first cited, the city of St. Louis had condemned a portion of the complainant's property for a street, and, assessed benefits and damages, and rendered judgment accordingly. The complainant filed a bill in the United States Circuit Court to enjoin the enforcement of the judgment, and also to obtain compensation for the property appropriated for the street. The bill set forth various grounds of alleged illegality in the proceedings, and a demurrer thereto was sustained. "Of these grounds for relief, the principal are," says Mr. Justice *Field*, giving the judgment of the Supreme Court, "that the proceedings were taken without notice to the complainant, or any appearance by him; that the notice provided by law was not published as required; that no provision was made for compensation for the property taken; that no power to render the judgment was vested in the mayor by the legislature or charter, and that the statute under which the proceedings purported to have been taken was repealed before the proceedings were completed. These grounds are, by the demurrer, admitted to be true, and being true, no reason exists upon which to justify the interposition of a court of equity." * * "The second object of the bill,—the obtaining of compensation for the property actually appropriated by the city,—falls with the first. If the proceedings for its appropriation were void, the title remains in the complainant, and he can resort [unless the legislature has required him to pursue a particular remedy] to the ordinary remedies afforded by law for the recovery of the possession of the real property wrongfully withheld, or for the redress of trespasses upon it." 5 Wall. 418, 419. Followed and approved. *Anderson v. St. Louis*, 47 Mo. 479, 486, 1871; distinguished, *Leslie v. St. Louis*, 47 Mo. 474; commented on, *Coulson v. Portland*, Deady, 481. The general subject is further treated in chap. XXII. *post*, secs. 787, 788, 740.

Where the charter of a city, in conferring upon it the power of opening streets, gives to the parties considering themselves aggrieved by the proceedings an *appeal to a court* of competent jurisdiction, with a right to a jury trial, they should seek redress in that tribunal, and not, at least, ordinarily, by a bill in equity. *Methodist Protestant Church v. Baltimore*, 6 Gill (Md.) 391, 1848; *Dusseau v. Municipality*, 6 La. An. 575; *Stewart v. Baltimore*, 7 Md. 500, 1855; *Baltimore v. Clunet*, 28 Md. 449, 1865. If an appeal is given, that course is proper for an aggrieved party to pursue; if he has no other remedy, he may have a *certiorari*, but not an injunction, unless on equitable grounds. *State v. Wakely*, 2 Nott & McCord, 410; *State v. Cockrell*, 2 Rich. (S. C.) Law, 6; *Spray v. Thompson*, 9 Iowa, 40; *Ewing v. St. Louis*, *supra*.

A municipal corporation will, on application of the owner, be *enjoined from appropriating private property* for the purpose of a street, until it complies with the law, by assessing and tendering damages to the owner. *Lafayette v. Bush*, 19 Ind. 326, 1862. Or securing them. *Sower v. Phila-*

§ 477. Respecting *compensation*, the mode of ascertaining the amount in case of disagreement, and the time and manner of payment, and the remedies for its enforcement, a few principles applicable to municipal corporations must be noticed. Nearly all the constitutions provide that "just compensation" shall be made for the property taken; and that view is believed to be sound which regards this language as necessarily contemplating compensation of a pecuniary character, in respect to the property appropriated. Some of the constitutions go more into detail, and in terms provide that the compensation shall be made "in money," and some contain a clause as to the time of payment, as that it shall be *first made or secured*, that is, made or secured before the property is taken or applied to the proposed public use; and some contain a provision giving the land owner the right to have the compensation determined by a jury. It is not within the scope of this work to follow out these different provisions into the construction which they have received in the courts of the various States, nor to descend to a detailed notice of all the decisions upon special enactments or charters. It must suffice to state the leading principles which the adjudications have established, and to refer to the authorities for a more full illustration and development of the subject. In the outset it is proper to observe that a fundamental consideration in the construction and application of these constitutional provisions is,

delphia, 85 Pa. St. 231; *Eidemiller v. Wyandotte City*, 2 Dillon C. C. 1873; *Gardner v. Newburg*, 2 Johns. Ch. 162, 1816.

When equity will *interfere by injunction* to restrain the illegal and unauthorized acts of municipal corporations. See *post*, chap. XXII. sec. 737 *et seq.* *Reddall v. Bryan* (condemnation of property), 14 Md. 444; *Richardson v. Baltimore*, 8 Gill (Md.) 433, 1849; *Alexander v. Baltimore*, 5 Gill (Md.) 388. Opening streets. *Attorney General v. Peterson*, 1 Stockt. (N. J.) 624; *Trustees v. Davenport*, 7 Iowa, 213; *Connolly v. Griswold*, 7 Iowa, 416; *Ib.* 248; *Harness v. Canal Company*, 1 Md. Ch. Dec. 248; *Walker v. Railroad Company*, 8 Ohio, 38; *Railroad Company v. Owings*, 15 Md. 199; *Henry v. Railroad Company*, 10 Iowa, 540; *Browning v. Railroad Company*, 3 Green Ch. (N. J.) 47; *Ragatz v. Dubuque*, 4 Iowa, 349.

As to prohibition as a remedy against illegal corporate proceedings: *State v. Wakely*, *supra*; *Mayo v. James*, 12 Gratt. (Va.) 17; *Warwick v. Mayo*, 15 *Ib.* 528; *Ex parte Williams*, 4 Pike (Ark.) 537 and note, with forms. *Arnold v. Shields*, 5 Dana (Ky.) 18. *Post*, chap. XXII. sec. 744.

that they have been found necessary to secure adequate protection to private property, and that they should be vigorously upheld in their full extent and fair meaning. In construing statutes or charters delegating the power of eminent domain, and pointing out the mode of exercising it, it is the duty of the judicial tribunal to insist that every provision intended for the benefit of the owner shall be complied with before he shall be divested of his property. Except so far as the mode of procedure is ordained by the constitution, it is competent for the legislature to prescribe it, and the mode prescribed must, as we have seen, be strictly and guardedly pursued, although unreasonable nicety should not be, and is not, required.¹

§ 478. If the act or charter authorizing the appropriation of the property itself provides a *specific remedy* to the land owner, by which the amount of his compensation shall be ascertained, that method is usually regarded as exclusive. So long as the municipality keeps within its legislative grant of power, it is not liable to a common law action, nor will it be enjoined; yet if it violates or transcends its authority, the land owner may bring his action of case or trespass, and equity will frequently grant an injunction to restrain an illegal use or appropriation of private property.²

§ 479. When a street is *finally established*, the party whose land has been taken *is entitled to payment*, although the street has not been opened.³ So it is generally held

¹ Redfield on Railways, sec. 64, and notes; *Ib.* sec. 72.

² See authorities cited, *supra*, sec. 476, note. This subject is very fully treated in Redfield on Railways, sec. 8, p. 336 (3rd edition). See, also, 1 American Railway Cases, 166-171, note, and cases cited and reviewed; *Floyd v. Turner*, 23 Texas, 293; *Cushman v. Smith*, 34 Maine, 247; *Sower v. Philadelphia*, 35 Pa. St. 231.

³ *Shaw v. Charlestown*, 3 Allen, 538; *Philadelphia v. Dickson*, 38 Pa. St. 247; *Griggs v. Foote*, 4 Allen, 195. The constitutional provision against taking private property until compensation be made, means *taking* the property from the owner and *actually* applying it to the use of the public. A survey and other preliminary steps are not a *taking*, within the meaning of the constitution. But until the compensation the owner is entitled to has been made or tendered as required by law, a street cannot be opened or used, and an entry to grade or prepare the ground for a street would be

that such a party is entitled to payment when the report of the commissioners of assessment has been finally acted on and confirmed, or when, before confirmation, the municipal authorities have taken and retain actual use of his property.' When the owner's right to damages is vested or complete, he may, in proper cases, sue the municipality therefor, or have a *mandamus* to compel it to pay or to proceed to collect the assessments which constitute the fund from which payment must come.'

§ 480. In the absence of controlling constitutional provisions, it is competent for the state to authorize municipal corporations to take private property for public use *without first making payment*; but it is not usual for the legislature to confer this power, and, even if it does, it is still necessary, by some enactment, that it shall make certain and adequate provision by which the owner can coerce compensation, through the judicial tribunals or otherwise, without unreasonable delay.' Either by constitutional provision

illegal and a trespass. *Stewart v. Baltimore*, 7 Md. 500, 1855. That preliminary surveys may be authorized by the legislature without making compensation therefor, and that, when so authorized, are not trespasses: See authorities cited in *Redfield on Railways*, sec. 66.

¹ *Ante*, secs. 474, 475. See *Johnson v. Almeda*, 14 Cal. 106. As to right of land owner to recover interest on assessment of damages. *Haley v. Philadelphia*, 68 Pa. St. 45, 48, 49.

² *Mayor, &c. v. Richardson*, 1 Stew. & Port. (Ala.) 12, 1831; *Shaw v. Charlestown*, 3 Allen (Mass.) 538; *Philadelphia v. Dyer*, 41 Pa. St. 463; *Philadelphia v. Dickson*, 38 *Ib.* 247; *State v. Hug*, 44 Mo. 116; *State v. Keokuk* (*mandamus* to collect assessment), 9 Iowa, 438; *Rexford v. Knight*, 11 N. Y. (1 Kern.) 308; *Higgins v. Chicago*, 18 Ill. 276; *Rome v. Jenkins* (action for value), 30 Geo. 154, 1860. *Fost*, sec. 769, note. A city is not primarily liable for benefits assessed against individuals. *Shaffner v. St. Louis*, 31 Mo. 264.

³ *People v. Hayden*, 6 Hill (N. Y.) 359; *Rexford v. Knight*, 11 N. Y. 308; *Cooley Const. Lim*, 560; *Curran v. Shattuck*, 24 Cal. 427; *McCann v. County*, 7 Cal. 121. Authority to towns and cities to open streets, and to take private property for public use, without *first* making compensation therefor, has frequently been held legal in the absence of special constitutional provisions requiring payment before possession or use be enjoyed. *Dronberger v. Reed*, 11 Ind. 420, 1858; *McCormick v. Lafayette*, 1 Ind. (Cart.) 48, 1848; *Bloodgood v. Railroad Co.* 18 Wend. 1; *Beekman v. Railroad Co.*, 3 Paige Ch. R. 45; *Commissioners v. Bowie*, 34 Ala. 461; *Lafayette v. Bush*,

or legislative enactment, the almost invariable, and certainly the just, course, is to require payment to precede or to accompany the act of appropriation.¹

§ 481. In the absence of special constitutional restrictions upon the power of the legislature, it may be regarded as settled by repeated adjudications in different States, that authority may be conferred by the legislature upon municipal corporations to open streets, and *to apportion the damages* awarded or found due to those whose lands are taken *among the lots benefited* by the improvement, and to make the amount thus apportioned or assessed a lien thereon. The legislature may, in its discretion, authorize the whole expense to be assessed upon the lots fronting on the street to be opened or improved, thus treating the adjacent property as exclusively benefited, or may authorize the assessment to be made upon other property in addition, or it may provide for the payment of damages, in whole or in part, from the general treasury.² The *compulsory acquisition of prop-*

19 Ind. 326. If a mode of obtaining compensation is specifically provided, compensation, it has been held, must be sought in that way, and not by action, and, in such case, the doctrine of cumulative remedies is not applicable. *Kimble v. Canal Company*, 1 Ind. (Cart.) 285, 1848; *Colking v. Baldwin*, 4 Wend. 667; *Railroad Company v. Smith*, 6 Ind. 249; *Railroad Company v. Connelly*, 7 Ind. 32; *Railway Company v. Oakes*, 20 Ind. 9, 1863; *Mitchell v. Turnpike Company*, 3 Humph. 456; *Brown v. Beatty*, 34 Miss. 227; *Dodge v. Commissioners*, 3 Met. 380.

¹ 2 Kent Com. 339, note; *Redfield on Railways*, 147; *Colton v. Rossi*, 9 Cal. 595, 1858; *McCann v. County* 7 Cal. 121. An injunction was granted to restrain a municipal corporation with very limited powers of taxation from opening a street until adequate security for compensation be given. *Keene v. Bristol*, 26 Pa. St. 46. See *Long v. Fuller*, 68 Pa. St. 170, 1871. Under a statute of Pennsylvania, land taken for corporate purposes vests in the corporation in fee on payment, and the corporation is not bound to see to the application of the purchase money. *Crangle v. Harrisburg*, 1 Barr (Pa.) 132. When payment of damages is required within a limited time, or proceedings become void, see *Commonwealth v. County Commissioners*, 2 Whart. (Pa.) 286.

² *People v. Mayor, &c. of Brooklyn*, 4 N. Y. (4 Comst.) 419, 1851, the leading case upon the subject. Approved, *Commonwealth v. Woods*, 44 Pa. St. 113; *Stroud v. Philadelphia*, 61 Pa. St. 255; *Scovill v. Cleveland*, 1 Ohio St. 126, 135; *Alexander v. Baltimore*, 5 Gill (Md.), 1847; *Moale v. Baltimore*, 5 Md. 314, 1854: expressly approving, *People v. Mayor, &c. of*

erty for streets, or other public purposes, and the payment therefor in any of the above modes, involve the exercise of two different and high prerogative or sovereign powers, namely, that of the *eminent domain*, so called, by which the property is taken, and that of *taxation* (which includes

Brooklyn, *supra*; *McMasters v. Commonwealth*, 3 Watts, 292, 1884; *Livingston v. Mayor*, 8 Wend. 85; *Schenley v. Allegheny*, 25 Pa. St. 128, 1854; *Betts v. Williamsburg*, 18 *Ib.* 26; *Lexington v. McQuillian's Heirs*, 9 Dana (Ky.) 518, 1853; *Williams v. Cammack*, 27 Miss. 209, 224, 1854; *Nichols v. Bridgeport*, 23 Conn. 189, 207. See, also, *McGehee v. Mathis* (levee tax), 21 Ark. 40, 1860; *Argenti v. San Francisco*, 16 Cal. 255; *Emery v. Gas Company*, 28 Cal. 345; *Howard v. Church*, 18 Md. 451; *Peoria v. Kidder*, 26 Ill. 351; *State v. Portage*, 12 Wis. 562; *Holmes v. Jersey City*, 1 Beas. (N. J.) 264; *Cuming v. Mayor, &c. of Brooklyn*, 11 Paige, 596; *White v. Mayor, &c.*, 2 Swan (Tenn.) 864, 1852; *Palmyra v. Morton*, 25 Mo. 593, 1857; *Egyptian Levee Company*, 27 Mo. 495; *Lockwood v. St. Louis*, 24 Mo. 20, 1851; *Smith v. Aberdeen*, 25 Miss. 458, 1853; *Municipality v. Dunn*, 10 La. An. 57; *Cruikshank v. City Council*, 1 McCord (South Car.), 360, 1821; *Williams v. Detroit*, 2 Mich. 560; *Cone v. Hartford*, 28 Conn. 363, 374; *Wallace v. Shelton*, 14 La. An. 498; *Clapp v. Hartford*, 35 Conn. 66; *Dorgan v. Boston*, 13 Allen (Mass.), 223. *Post*, chap. XIX. on Taxation. Under a constitutional provision giving the power of taxation by assessment, and another which guarantees to owners of land taken for public use full compensation, "without deduction, for benefits," an *assessment* may be made upon lands fronting on a new street laid out through it, to reimburse the amount of compensation paid the owner for the land taken for the street. *Cleveland v. Vick*, 18 Ohio St. 303, 1868. See *Chicago v. Larned*, 84 Ill. 203, 1864, criticising *The People v. Mayor, &c. of Brooklyn, supra*, and the decisions in other states which follow it, and holding them inapplicable in that state under its constitution. *S. P. Ottawa v. Spencer*, 40 Ill. 211; *S. C.*, 36 Ill. 211. In the case of *The State v. Charleston*, 12 Rich. (South Car.) Law, 702, 1860, the power of the legislature of that state to authorize local assessments to pay for local improvements was very fully considered by the Court of Errors. A portion of a street was widened by taking a strip of land off the lots on one side and adding it to the street, and the expense, pursuant to an act of the legislature, was ordered to be assessed upon the proprietors of houses and lots on both sides of the street. The lot owners on the opposite side of the street, whose lands were not taken for the street, but who were assessed to pay the expense, contested the constitutionality of the statute authorizing this to be done. The Court of Errors held the act to be unconstitutional. No reference is made to the decisions in other states, and although the constitutions of New York and South Carolina are not literally alike, the reasoning of the court is not reconcilable with that in the case of *People v. Mayor, &c. of Brooklyn*. Still the latter case has been very generally followed and its reasoning approved as sound, as will be seen on an examination of the cases above cited.

assessments upon the property benefited or legislatively supposed to be benefited), by which compensation is made to those whose property has been thus appropriated. We have already pointed out the usual constitutional limitations upon the power of eminent domain. What limitations exist upon the power of taxation must be found in the nature of the power itself, and in express or implied restrictions of the organic law; otherwise, the power is supreme, transcendent, and without theoretical limits. The subject of taxation and of assessments for local improvements, and the limitations upon the power, will be hereafter considered, and need not, therefore, be referred to in detail in this place.¹ An assessment against abutters for benefits received from the opening of a street does not contravene the provision of the constitution, "that all property subject to taxation shall be taxed in proportion to its value."² Nor is an assessment upon lands fronting on a street, to reimburse the amount paid the owner for land taken from him for a street, in violation of the provision of the constitution, which declares the compensation to be paid to a party for his land taken for public use, shall be "without *deduction* for benefits."³

§ 482. The *tribunal* by which the amount of compensation to the land owner is to be determined must be prescribed by positive law. Some of the state constitutions, in terms, require that the compensation shall be assessed by a *jury*, which presumptively means such a body as under the constitution and laws of the particular state makes a lawful jury. Commissioners appointed *ex parte*, and without opportunity of challenge, are not a jury. Where the right to an assessment by a jury is specifically secured by constitutional provision, this is a right of which the property owner cannot be deprived by any act of legislature, nor by its

¹ See chapter on Taxation and Local Assessments, *post*.

² *Garrett v. St. Louis*, 25 Mo. 505, 1857. So, under a constitution which requires that all taxation shall be equal and uniform *throughout the state*. *Draining Company Case*, 11 La. An. 338. See chapter on Taxation and Local Assessments, *post*.

³ *Cleveland v. Wick*, 18 Ohio St. 303. Assessment for benefits is not the same as deduction for benefits. *Ib.*

failure to provide for an assessment in this manner. He may waive the right, but he cannot be deprived of it without his consent. Although the right to an assessment by a jury of twelve men be given by the constitution, the assessment may, under legislative authority, be made in the first instance by commissioners, if, by appeal or other transfer, to a common law court, an unfettered right to an assessment by a jury under judicial direction exists or is provided.¹

¹ *Lamb v. Lane*, 4 Ohio St. 167, 1854. The able opinion of *Thurman, C. J.*, and its reasoning, must command general assent. The constitution of *Ohio* (article 1, sec. 19) provides, that "Where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury without deduction for the benefits to any property of the owner." The court held that the word "jury," as thus used, means a tribunal of twelve men presided over by a court, and hearing the allegations, evidence, and arguments of the parties, yet they may be sent to view the premises. The court also held, that an assessment might be made in the first instance by viewers, if the right of appeal be given to a court in which the damages may be assessed by a constitutional jury. *S. P. Shaver v. Starrett*, 4 Ohio St. 404; *Wills v. County Road*, 7 Ohio St. 16. Construction of similar provision of constitution of *Iowa* (art. 1, sec. 18), see *Des Moines v. Layman*, 21 Iowa, 153, 1866, in which it was not denied that the constitution gave the right to have the amount determined by a jury, but it was held by the majority of the court that the party, by adopting the special mode of review pursued by him in that case, was not entitled, as of right, to an assessment by a jury.

Section 7, article 1, of the constitution of 1846 of *New York*, provided that "When private property shall be taken for any public use, the compensation to be made therefor shall be ascertained by a jury or by not less than three commissioners appointed by a court of record as shall be prescribed by law." It was held, in view of a long legislative usage in respect to the subject of assessing damages and the mode, that the term "jury," as used in the constitution, did not necessarily import a tribunal consisting of twelve men, acting only upon a unanimous determination, but on the contrary, was used to describe a body of jurors of different numbers, and deciding by majorities or otherwise, as the legislature in each instance directed. But in the absence of such usage, *Johnson, J.*, who delivered the opinion of the court, said that without a shadow of doubt resting on his mind, he should be of opinion that the term "jury" imports a jury of twelve men, whose verdict is to be unanimous. "Such," he continues, "must be its acceptance to every one acquainted with the history of the common law, and aware of the high estimation in which that institution, so constituted, has for so long a period been held." *Cruger v. Railroad Company*, 12 N. Y. (2 Kern.) 190, 1854; *Brooklyn v. Patchen*, 8 Wend. 47, 1831; *Campau v. Detroit*, 14 Mich. 276, 1866; *Peninsular Railway Company v.*

§ 483. The determination of the question, What is the *value of property* taken, or what is the *amount of damage* sustained by the taking, is undeniably judicial in its nature, and peculiarly adapted for decision by a jury under the direction of the court. Yet it has been held that the ordinary provision as to the right of trial by jury in civil cases has no relation to original assessments in such cases; and

Howard, 20 Mich. 18, 1870; *May v. Railroad Company*, 3 Wis. 219. Under the new constitution of *Illinois*, the land owner has a right to a jury to assess his damages if he demands it. *The People v. The Judge, &c.*, Ill. Supreme Court, April, 1862.

That a special constitutional provision, giving the right to an assessment of damages by a *jury*, presumptively means more than a mere commission, however numerous, and means a tribunal under judicial supervision and control, is made more apparent when the occasion of adopting such a provision is considered. This aspect of the subject is referred to by one of the judges in *Des Moines v. Layman*, 21 Iowa, 158, who says: "The taking of private property, without the consent of the owner, is the exercise of one of the highest powers of government. It has been much abused by the great powers which have been conferred upon municipal corporations, allowing them to judge of the necessity, and their citizens to act by a commission from the city council or some subordinate magistrate or court, as a jury or body to fix the amount of compensation. To prevent such abuses, and to give proper security and safeguards to the property owner, it was very wisely provided in the new constitution of the state, that private property should not be taken for public use until '*the damages shall be assessed by a jury*.'" Bill of Rights, sec. 18. "The right of trial by jury shall remain inviolate, but the general assembly may authorize a trial by a jury of a less number than twelve in the inferior courts." *Ib.* sec. 9. By these provisions, the right to an assessment of his damages by a *jury* is secured by the constitution to the defendant. No assessment of them has been made by a jury unless the three men appointed by the county court are to be regarded as a jury. I do not so regard them."

The constitution of *Maryland* provides "that no private property shall be taken for public use without just compensation, as agreed upon between the parties or awarded by a *jury*, being first paid or tendered to the party entitled to such compensation." Under this the legislature may pass a law authorizing commissioners to assess the value of the property if the law secures to the owner the right of a jury trial, *upon an appeal*, to be taken in a specified reasonable time; neglect or refusal to appeal being regarded as a waiver of the right to have the damages awarded by a jury. *Stewart v. Baltimore*, 7 Md. 500, 1855. See, also, *State v. Graves*, 19 Md. 351; *Lumsden v. Milwaukee*, 8 Wis. 485; *Alexander v. Baltimore*, 5 Gill, 883; *M. E. Church v. Baltimore*, 6 *Ib.* 391; *Morford v. Barnes*, 8 Yerg. 444; *Beers v. Beers*, 4 Conn. 535; *McDonald v. Schell*, 6 Serg. & Rawle, 240; *Sharpless v. West Chester*, 1 Grant Cas. (Pa.) 257.

that in the absence of special provision in the organic law, giving the right to have a jury assess the damages, it is competent for the legislature to provide for assessments by any other just mode, and to conclude the owner as to the amount without giving him the right to be heard before a jury.¹

§ 484. By the constitution of New York it is provided that the compensation "shall be ascertained *by a jury, or by* not less than *three commissioners* appointed by a court of record." This language in respect to commissioners was considered by the Court of Appeals to imply that the commissioners were to be selected by the court, and assumes that in such selection the court will exercise judgment in making fit appointments, and it was held that a selection of appraisers by lot, and an appointment thereon by a court of record, would not be in compliance with the constitutional provision.² It was also decided, that under this provision

¹ *Livingston v. Mayor, &c.*, 8 Wend. 85, 1881; *Beekman v. Railroad Company*, 3 Paige, 75; *Petition of Mt. Washington County*, 35 N. H. 134; *State v. Jersey City*, 2 Dutch. 444; *Sedgw. Stat. and Const. Law*, 529; *Cooley Const. Lim.* 563; *Railroad Company v. Heath*, 9 Ind. 558; *Hymes v. Aydelott*, 26 Ind. 431; *Heyneman v. Blake*, 19 Cal. 579; *Koppikus v. Commissioners*, 16 Cal. 248; *Dalton v. Northampton*, 19 N. H. 362. As to right of *trial by jury when an appeal* is authorized to a court of record. *Railroad Company v. Miller*, 30 Ind. 209; *Railroad Company v. Heath*, 9 Ind. 558; *Connelly v. Griswold*, 7 Iowa, 416; *Ragatz v. Dubuque*, 4 Iowa, 343; *People v. The Judge, &c.*, Ill. Supreme Court, April, 1872; *Warren v. Railroad Company*, 18 Minn. 884, 1872; *Weir v. Railroad Company*, 18 Minn. 155, 1872.

The constitution of *Wisconsin* contained a provision (art. 11, sec. 2) requiring "the necessity" for the appropriation of private property to "be first established by the verdict of a jury." In the charter of Milwaukee it was enacted that a jury of six freeholders should be appointed by the council to decide upon the necessity of taking land for streets, and the amount of compensation, and this provision of the charter was held to contravene the constitution, since the jury so called were not required by the charter to be sworn, and since the charter gave the council power to confirm the report of the jury, and declared that such confirmation should be conclusive. *Lumsden v. Milwaukee*, 8 Wis. 485. There is a similar provision in the constitution of 1851, of *Michigan*. *People v. Kimball*, 4 Mich. 95; *Campau v. Detroit*, 14 Mich. 276; *Horton v. Grand Haven*, 24 Mich. 465.

² *Cruger v. Railroad Company*, 12 N. Y. (2 Kern.) 190, 1854.

it is not competent for the legislature to authorize the common council of a city to appoint appraisers to ascertain the compensation to owners for property taken under the power of eminent domain.¹

§ 485. The charter of a city gave it power to take private property for streets, with a proviso that damages should be assessed, by a jury, to those prejudiced. A jury acted and assessed damages to a property owner. It was held, that a subsequent resolution of the council, reciting "that upon full examination the jury could not have had a correct view of the case before them," and appropriating a larger sum as damages, was binding upon the corporation, the court being of opinion that the corporation had the right to contract or stipulate with the land owner as to damages without the intervention of a jury, and that this included the right to disregard their finding, and proceed to make a settlement as if they had never been summoned.²

§ 486. Concerning the *amount of damages*, or the principles upon which compensation to the owner whose property is taken should be measured, there are no fixed rules embracing the whole subject universally applicable throughout the different states. In some of the states provision is made in their organic law, that the compensation shall be in money, and without deduction for benefits. Similar provisions are sometimes made in the charter or statute authorizing the appropriation, and which exert a modifying influence on the rules of law, as previously held in the same state or elsewhere. In determining the *quantum* of damages, regard must also be had to any special constitutional, or statutory provisions relating to the subject, and the previous course of decision in which those provisions have not unfrequently originated. In states where the subject is not expressly regulated by positive law, the books

¹ Clark v. Utica, 18 Barb. 451.

² Mayor, &c. v. Richardson, 1 Stew. & Port. (Ala.) 12, 1831. This case further holds, that on the consent of the land owner to the resolution, he could maintain an action for the recovery of the amount, and that the resolution was an admission, *prima facie* binding on the corporation, of the right of the owner to the land appropriated. *Ib.*

abound in cases which cannot be reconciled respecting what is and is not proper to be taken into consideration in the way of benefits on the one hand, and of injuries on the other, to the proprietor, whose property is taken for some public work or improvement. The ultimate inquiry is not a complex one—it is simply, What is the damage which the owner will sustain in consequence of the proposed appropriation of his property? But the elements which enter into this inquiry, when the matter is left at large to the courts without legislative rule, are far from being easy of apprehension or application. Cases, however, in which the appropriation is by municipal agencies for streets, are not apt to present as many difficulties as are met with when the appropriation is for railway or other like purposes.

§ 487. The author must content himself with a statement of those rules or principles which he believes to be the best supported by reason, and which are sufficient to embrace the cases which ordinarily arise in connection with the exercise of the right of eminent domain by municipalities, whose chief occasion for the power is to open and establish streets and ways. The rules laid down are, of course, subject to modification by any special constitutional provision or legislative enactment varying them. 1. If the proposed improvement takes *all* of the land of the owner, the case, as to the amount of compensation, is comparatively easy of solution. He is entitled to the fair and full market or pecuniary value of the property at the time it is appropriated, but to no more. This statement of the rule excludes from consideration all such elements as that the owner does not desire to sell, or that the property is endeared to him by association, and the like.¹ But it includes, and justly so, the full value at *the time* it is taken, no matter what may have caused that value, and although it may have shared, with other property, in the benefits of the proposed improvement. The transaction is a compulsory purchase, the compulsion, however, coming from the public, and the amount to which the owner is entitled is not simply the value of the property at forced sale, but such sum as the

¹ Furman Street, 17 Wend. 650; William and Anthony Streets, 19 Wend 678.

property is worth in the market, if persons desiring to purchase were found who were willing to pay its just and full value, but no more ' 2. If, however, as most commonly happens, *part* only of the property is to be taken, more embarrassing questions are apt to arise, in determining which regard must be had to the condition as to shape, use, and convenience, in which the residue of the property will be left, and how its value will be affected by that which is taken for the proposed improvement. And here, most usually, arises the difficult inquiry, What benefits and what injuries are proper to be regarded as affecting the question of damages? Now benefits and injuries are of two kinds: I. General or public, being such as are not peculiar to the particular proprietor, part of whose property is taken, but those benefits in which he shares, and those injuries which he sustains, in common with the community or locality at large. II. Special or local, being those peculiar to the particular land owner, part of whose property is appropriated, and which are not common to the community or locality at large, such, on the one hand, as rendering his adjoining lands more useful and convenient to him, or otherwise giving them a peculiar increase in value, and, on the other, rendering them less useful or convenient, or otherwise, in a peculiar way, diminishing their value. The former class of benefits or injuries—namely, those which are general, and not special—have, according to the almost uniform course of decision, no place in the inquiry of damages, and cannot be considered for the purpose of reducing the amount, being too indirect and contingent. But injuries which specially affect the proprietor, or benefits which are specially conferred upon his adjacent property, part of which is taken, are to be considered, unless, by the constitution of the state or legislative enactment, *all* benefits, special as well as general, are to be excluded.'

¹ Railroad Company v. Doughty, 2 Zab. 495, 1850; Cooley Const. Lim. 565; Giesy v. Railroad Company, 4 Ohio St. 308, 1854.

² Meacham v. Railroad Company, 4 Cush. 291, 1849; Dickenson v. Fitchburg, 13 Gray, 546; Upton v. Railroad Company, 8 Cush. 600, 1851; Robins v. Railroad Company, 6 Wis. 686; Farwell v. Cambridge, 11 Gray, 413; Dwight v. Commissioners, 11 Cush. 201; Howard v. Providence, 6 Rh. 1a.

§ 488. Applying these principles, *a proper and practical rule* would be to first ascertain the fair market value of the entire premises, part of which is proposed to be taken, *not necessarily irrespective of such improvement, but irrespective of the causes which have contributed to that value*, then ascertain the like value of the premises in the condition in which they will be after the part is taken, without deduction for any general benefit which will result from the proposed improvement, but, unless specially excluded by positive law, deducting special benefits as above defined,

514. A learned jurist, and experienced and able judge, thus expresses his views on this subject: "When only a portion of a parcel of land is appropriated, just compensation may, perhaps, depend upon the effect which the appropriation may have on the owner's interest in the remainder to increase or diminish its value, in consequence of the use to which that taken is to be devoted, or in consequence of the condition in which it may leave the remainder in respect to convenience of use. If, for instance, a public way is laid out through a tract of land which before was not accessible, and if, in consequence, it is given a front, or two fronts, upon the street, which furnish valuable and marketable sites for building lots, it may be that the value of that which remains is made, in consequence of taking a part, vastly greater than the whole was before, and that the owner is benefited instead of damnified by the appropriation. Indeed, the great majority of streets in cities and villages are dedicated to the public by the owners of lands, without any other compensation, or expectation of compensation, than the increase in market value which is expected to be given to such lands thereby; and this is very often the case with land for other public improvements which are supposed to be of peculiar value to the locality in which they are made. But where, on the other hand, a railroad is laid out across a man's premises, running between his house and his outbuildings, necessitating, perhaps, the removal of some of them, or upon such a grade as to render deep cuttings or high embankments necessary, and thereby greatly increasing the inconveniences attending the management and use of the land, as well as the risks of accidental injuries, it will often happen that the pecuniary loss which he would suffer by the appropriation of the right of way would greatly exceed the value of the land taken, and to pay him that value only would be to make very inadequate compensation." Cooley Const. Lim. 565.

"Just compensation" consists in making the owner good by an equivalent in money, and includes not only the value of the land appropriated, but the diminished value of the residue. *Bigelow v. West Wis. Railway Co.*, 27 Wis. 478, 487, 1871.

The phrase in an act allowing "*any benefit*" to be considered in estimating damages to the land owner, construed and limited. *Wier v. Railroad Co.*, 18 Minn. 169, 1872.

and the difference in value, be it more or less than the value of the part taken, will constitute the measure of compensation.¹ Even without an express provision of law requiring

¹ See *Sater v. Plank Road Company*, 1 Iowa, 393, decided under the constitution of 1846. The rule, as there laid down, does not fully accord with that stated in the text, since it requires the marketable value of the premises proposed to be taken to be ascertained irrespective of the proposed improvement, and does not distinguish between general and special benefits. By the *Iowa* constitution of 1857, *benefits are excluded*. *Deaton v. Polk County*, 9 Iowa, 594; *Israel v. Jewett*, 29 Iowa, 475; *Pennsylvania rule* is similar to the one in *Sater v. Plank Road Company*, *supra*; *Watson v. Railroad Company*, 37 Pa. St. 469; *Pennsylvania Railroad v. Heister*, 8 Pa. St. 445; *Hornstein v. Railroad*, 51 Pa. St. 87. *As to general and special benefits*. *Railroad Company v. Collett*, 6 Ohio St. 182, 1856; *Railroad Company v. Ball*, 5 Ohio St. 568; *State v. Digby*, 5 Blackf. 548; *Robbins v. Railroad Company*, 6 Wis. 636; *Hornstein v. Railroad Company*, 51 Pa. St. 87; *Woodfolk v. Railroad Company*, 2 Swan, 422; *McIntire v. State*, 5 Blackf. 394; *Railroad Company v. Hunter*, 8 Ind. 74; *Vanblaricum v. State*, 7 Blackf. 209; *McMahon v. Railroad Company*, 5 Ind. 418; *Isom v. Railroad Company*, 36 Miss. 300; *Pacific Railroad v. Chrystal*, 25 Mo. 544; *Newby v. Platte County*, 25 Mo. 258; *Sutton v. Louisville*, 5 Dana, 28; *Jacob v. Louisville*, 9 Dana, 114; *Arnold v. Bridge Company*, 1 Duvall (Ky.) 372; *Robinson v. Robinson*, 1b. 162; *Shipley v. Baltimore, &c. R. R. Co.*, 34 Md. 336, 1871. In *Mississippi*, even *incidental benefits* cannot be set off against incidental damages: *Railroad Company v. Moya*, 39 Miss. 374, 1860. In *Georgia*, *benefits are excluded*. *Savannah v. Hartridge*, 37 Geo. 118, 1867.

The opinion of *Ranney, J.*, in *Giesy v. Railroad Company*, 4 Ohio St. 308, 1854, contains an able exposition of the *principles upon which damages should be assessed* under the constitution of *Ohio*, which contains a provision that the "compensation shall be assessed by a jury, without deduction, for benefits to any property of the owner." In the course of his opinion he says: "Whether property is appropriated directly by the public or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken—as much as he might fairly expect to be able to sell it to others for, if it was not taken—and this amount is not to be increased from the necessity of the public or the corporation to have it, on the one hand, nor diminished from any necessity of the owner to dispose of it on the other. It is to be valued precisely as it would be appraised for sale upon execution, or by an executor or guardian, and without any regard to the external causes that may have contributed to make up its present value. The jury are not required to consider how much, nor permitted to make any use of the fact that it may have been increased in value by the proposal or construction of the work for which it is taken. To allow this to be done would not only be unjust, but would effect a partial revival of the very abuse which it was a leading purpose of these constitutional provisions to correct. It would be unjust, because it establishes for a corporation what is done for no one else, a sort of right in the property of

that there shall be no reduction for benefits, it seems to the author unjust to require that the value of the land shall be ascertained irrespective of those *general* benefits which are common to all land in the vicinity, and which arise out of the proposed improvement. And the rule held by some courts, that these benefits shall be excluded in ascertaining the value of the whole land in the first instance, and then allowing to be deducted from this sum the value of the remaining portion after the improvement is made, is still more indefensible, and it was the general conviction of the injustice of such a rule that has led to so many constitutional provisions and legislative enactments prohibiting the land owner from being charged with benefits. But for benefits, direct and special to him, he should be charged in making the estimate of the amount to which he is justly entitled, unless, by the constitution or statute, even such benefits are not to be considered.

others to the reflected benefits of its improvement, itself submitting to no reciprocity by affording others a compensation for the effect of their improvements upon the property of the corporation. And it is doubly unjust where, ~~as~~ must very often happen, the increase in value accrued to the benefit of a former owner, and has been bought and paid for by the present holder, from whom the property is taken at a diminished price." So, in the *Railroad Company v. Doughty*, 2 Zab. 495, 1850, the Supreme Court of *New Jersey* expresses its opinion to be, that in estimating the value of land taken for the purpose of a public improvement the present value of the lands, not at a forced sale, but at a sale which a prudent holder would make if he had the power to choose his own time and terms, is to be given.

In the case of *Paul v. Newark*, at the Essex (N. J.) Supreme Court circuit, *Depue, J.*, held, that a house wholly within the line of the proposed street must (if the owner so wishes) be taken and paid for in full by the city, and the city cannot compel him to move it by merely paying costs of removal and restoration, even although the owner has immediately adjacent land, sufficient to accommodate the house. When statutes provide for taking "lands," the word is used in its broad signification, and includes all things affixed to lands. In *Meyer v. Newark*, where only a part (about one-half) of a house was within the lines of the proposed street, the question was left for review before the court *in banc*, whether the city was compelled to take the whole, or merely to pay for the damages incident to the destruction of the half of the house; the court, however, strongly intimated, that in cases where the house was not entirely destroyed, it was only necessary to pay damages sufficient to compensate the owner, and the whole need not be taken or paid for. 1b. 6 Am. Law Review, 576, from which the above is extracted.

Measure of compensation to lessor and to lessee. *Dyer v. Wightman*, 66 Pa. St. 425, 1870.

CHAPTER XVII.

DEDICATION.

§ 489. This chapter will treat of the doctrine of the dedication of property to public uses, so far as relates to municipalities, under the following arrangement :

1. Importance of the Doctrine of Dedication—sec. 490.
2. Statutory and Common Law Dedications—secs. 491, 492.
3. Common Law Dedication—*Rationale* and Requisites—secs. 493–495.
4. Extent of Dedication as Respects the Donor—secs. 496, 497.
5. Who May Dedicate—Intent—How Established—secs. 498, 499.
6. Effect of Long User and Acquiescence—secs. 500–502.
7. Effect of Platting and Sale of Lots—secs. 503, 504.
8. Acceptance by the Public—When and for What Purpose Necessary—sec. 505.
9. Dedication of Public Squares and Their Uses—secs. 506–509.
10. Dedications for Other Purposes—secs. 510, 511.
11. Alienation and Change of Use—secs. 512–514.
12. Reverter—Misuser—Remedy—sec. 515.

Importance of the Doctrine of Dedication.

§ 490. That *property may be dedicated to public use* is a well-established principle of the common law. It is founded in public convenience, and has been sanctioned by the experience of ages. Indeed, without such a principle, it would be difficult, if not impracticable, for society, in a state of advanced civilization, to enjoy those advantages which belong to its condition, and which are essential to its accommodation. The importance of this principle may not

always be appreciated, but we are in a great degree dependent on it for our highways and streets, and the grounds appropriated as places of amusement or of public business which are found in all our towns, and especially in our populous cities.¹

Statutory and Common Law Dedications.

§ 491. Dedications of land to public uses are divisible into two classes: 1. *Statutory Dedications*. 2. *Common Law Dedications*. Statutory dedications are made, and it has been decided can be made only, by pursuing substantially the course prescribed by the particular statute. Thus, if the statute requires that the map or plat describing the streets, alleys, commons, or other public grounds, shall be *acknowledged* before it is recorded, an acknowledgment is essential to a valid and effective dedication under the *statute*.² The *effect* of a dedication under the statute is often

¹ *Per McLean, J.*, in *New Orleans v. United States*, 10 Pet. 662, 712, 1886.

Dedication is "the act of devoting or giving property for some proper object, and in such a manner as to conclude the owner." *Bourdsley, J.*; *Hunter v. Sandy Hill*, 6 Hill (N. Y.) 407, 411, 1844. See *Dovaston v. Payne*, 2 Smith Lead. Cas. 90, and notes, for a general view of the law of dedication. There is an excellent view of the subject in Angell on Highways, chap. III. See, also, chapter on Eminent Domain, *ante*, and chapter on Streets, *post*.

² *Wisby v. Boute*, 19 Ohio St. 238; *Fulton v. Mehrenfeld*, 8 Ohio St. 440, 1858; questioning the *grounds* of prior decision in *Morris v. Bowers, Wright* (Ohio) 750; *Williams v. The Church*, 1 Ohio St. 478; *Winona v. Huff*, 11 Minn. 119, 1866; *Baker v. St. Paul*, 8 Minn. 491, 1868; *Schurmeier v. Railroad Company*, 10 Minn. 82, 1865; affirmed in Supreme Court, 7 Wall. 272, 1868; *State v. Hill*, 10 Ind. 219, 1858; *Hays v. State*, 8 *Ib.* 425; *Noyes v. Ward*, 19 Conn. 250, 1848; *Des Monies v. Hall*, 24 Iowa, 234, 1868. See *Ragan v. McCoy* (requisites of acknowledgment) 29 Mo. 356, 1860; *Detroit v. Railroad Company*, 28 Mich. 173, 1871; *Baker v. Johnston*, 21 Mich. 319, 1870. If the plat as recorded, pursuant to a statute requiring it, contains enough to show that it was intended by the owner to be a dedication under the statute, it would seem to the author, to be right, notwithstanding a defective acknowledgement, or the like, to hold the proprietor estopped to make the objection that he did not comply with the statute.

Authentication of town plats and maps, nature of evidence necessary, &c., effect of unrecorded map, &c., see *Commonwealth v. Alburger*, 1

declared. Thus, if it be provided by statute that the map or plat, "when so made and recorded, shall be deemed to be a sufficient *conveyance to vest the fee* in the county in which such town lies," this dispenses with any assent or acceptance on the part of the public, and in this respect differs from a common law dedication.¹ It differs, also, in the mode of operation, as by the language above quoted the estate vests in the public by *conveyance* or *grant*, whereas, at common law, a dedication to public uses in cases where there is no express grant to a grantee upon consideration, operates by way of an *estoppel in pais* of the owner, rather than by a grant or the transfer of an interest in the land.² It should be remarked, however, that an incomplete or defective statutory declaration will, when *accepted by the public*, or when rights are acquired under it by *third persons*, operate as a common law dedication by the owner.³

Whart. (Pa.) 469; Biddle v. Shippen, 1 Dallas, 19; Franey v. Miller, 1 Jones (Pa.) 435; Commonwealth v. Wood, 10 Barr (Pa.) 93; Baird v. Rice, 63 Pa. St. 489, 1871; Winona v. Huff, 11 Minn. 119; Ragan v. McCoy, 29 Mo. 356; Chicago, &c. Railroad Company v. Banker, 44 Ill.; United States v. Chicago, 7 How. 185. *Ante*, sec. 126, note.

Requirement that plat be recorded. Strong v. Darling, 9 Ohio 201; Pangborn v. Westlake, Iowa Sup. Court, June, 1873; 7 West. Jurist, 420, and cases cited by Cole, J.

¹ Fulton v. Mehrenfeld, 8 Ohio St. 440; Brown v. Manning, 6 Ohio, 298, 304, 1834; Baker v. St. Paul, 8 Minn. 491, 493, note remarks of *Flandrau*, J.; Ragan v. McCoy, 29 Mo. 356; Wisby v. Boute, 19 Ohio St. 238. See People v. Jones, 6 Mich. 176.

² *Ib. per Swan*, J., 8 Ohio St. p. 444, *supra*; Cincinnati v. White, 6 Pet. (U. S.) 582; Town of Paulet v. Clark, 9 Cranch, 202; Hunter v. Trustees, 6 Hill (N. Y.), 407; Curtis v. Keesler, 14 Barb. 521; Brown v. Manning, 6 Ohio, 298, 303, and cases cited; Cincinnati v. Commissioners, &c., 7 Ohio, pt. 1, 88; *Ib.* 217; Schurmeier v. Railroad Company, 10 Minn. 82, 104.

³ 8 Ohio St. 440, *supra*; Baker v. Johnston, 21 Mich. 319, 1870. Equitable owner may dedicate, and trustee holding the mere naked legal title is bound to respect it. Williams v. The Church, &c., 1 Ohio St. 478; Baker v. St. Paul, 8 Minn. 491; Hannibal v. Draper, 15 Mo. 638; Ragan v. McCoy, 29 Mo. 356, 366, 1860; Johnson v. Scott, 11 Mich. 232; Doe v. Attica, 7 Ind. 641, 1856; Dover v. Fox, 9 B. Mon. 200; Banks v. Ogden, 2 Wall. 57; Sargent v. Bank, 4 McLean, 339; 12 How. 371. "The authorities show that dedications have been established in every conceivable way by which the intention of the party could be manifested." *Per Breese*, J., in Waught v. Leech, 28 Ill. 488, 1862; Alvord v. Ashley, 17 Ill. 363; Dunion v. People *Ib.* 416. Thus, the *making and recording* of a town plat is evidence of the

§ 492. Although the effect of a statutory dedication may be to grant the fee of the streets to the corporation in trust for the public uses, yet, unless prohibited by statute, *the proprietor*, in laying out a town or addition, *may grant the easement simply*, and reserve the minerals therein.¹ But such proprietor cannot confer upon a county or extraneous corporation the control of streets in a city, and thus deprive the proper municipal corporation of such control given it by law.²

Common Law Dedication—Rationale and Requisites.

§ 493. As to *common law dedications*, the right to make which is not usually taken away or abridged by stat-

highest character of the dedication of the streets and alleys marked upon it. *Id.*; *Godfrey v. Alton*, 12 Ill. 29; *Belleville v. Stokely*, 28 Ill. 441.

Under the statutes of Kansas, the execution and recording of a plat of a city or town, conveys to the county the fee of such parcels of land as are therein expressed, named, or intended, for public use, in trust and for the uses therein named, expressed, or intended, and for no other use or purpose, and a subsequent conveyance of land thus dedicated to public uses by the proprietor of the city, town, or addition, to the county, does not destroy the trust created by the execution and recording of the plat. *County Commissioners v. Lathrop*, Supreme Court of Kansas, 1872, not yet reported. Construction of *Missouri statute*. *Price v. Thompson* (as to "park"), 48 Mo. 363; *Rutherford v. Taylor* (rights of adjoining owners), 88 Mo. 315.

¹ *Dubuque v. Benson*, 28 Iowa, 248, 1867. See *Noyes v. Ward*, 19 Conn. 250, 1848; *Manley v. Gibson*, 18 Ill. 812; *Peck v. Prov., &c. Co.*, 8 Rh. I. 353, 1866. Words on the plat, "The streets are dedicated for *street purposes, and that only*," held to give the public only an easement, and that subterraneous mines were reserved. 28 Iowa, 248, *supra*. Dedicator may limit duration. *Antones v. Eslava*, 9 Port. (Ala.) 527.

² *Des Moines v. Hall*, 24 Iowa, 284, 241, 1868. In this last case, construing the Iowa statute, it was held (*Cole, J.*, dissenting) that the laying off and recording a town plat or an addition thereto, under the code, had the effect to vest in the corporation the *fee simple title* to, and exclusive right of, dominion over the streets and alleys thus dedicated to the public use, and in such case the original proprietor has no right to the *subterraneous deposits of coal* within the limits of such streets, and the corporation may maintain an action against him for coal mined and taken by him from beneath the same. *Id.* Under the statute of Minnesota, it is held that under a statutory dedication the fee simple to land dedicated for streets, squares, &c., does not pass, but only such an estate or interest as the purposes of the trust require. *Schurmeier v. Railroad Company*, 10 Minn. 104; affirmed, 7 Wall. 272.

utory regulations respecting town plats, the subject may be advantageously presented by referring somewhat in detail to the leading case of the City of Cincinnati v. White,¹ decided by the Supreme Court of the United States, which has been extensively followed by the state tribunals, and is everywhere recognized as a sound exposition of the anomalous doctrines of the law respecting the rights which may be parted with by the owner and acquired by the public in this peculiar manner. In that case it appeared that in 1789 the original proprietors of Cincinnati designated, on the plan of the town, the land between Front-street and the Ohio river as a common, for the use and benefit of the town forever. A few years afterwards a claim was set up to this common by a person who had procured a deed from the trustee in whom the fee of the land was vested, and who had entered upon the common and claimed the right of possession. The proof of dedication (marking on the plat accompanied by public use) being made out to the satisfaction of the court, it sustained the rights claimed by the city. At the time the plan was adopted by the proprietors, and this ground was marked on the plat as a common, they did not, in fact, possess the equitable (or legal) title to the space dedicated; but they shortly afterwards purchased the equitable title; and it was held (their assent to the dedication continuing) that under the purchase the prior dedication was good.²

§ 494. In its opinion in the case just mentioned, the Supreme Court assert or assent to the correctness of the following principles: 1. That it is not essential to a dedication that the legal title should pass from the owner.³ 2. Nor is it essential that there should be any grantee of the use or easement *in esse* to take the fee, such cases being exceptions

¹ Cincinnati v. White, 6 Pet. (U. S.) 431, 1832. See Noyes v. Ward, 19 Conn. 250; Manley v. Gibson, 18 Ill. 312.

² Per McLean, J., in New Orleans v. United States, 10 Pet. 718.

³ Lade v. Shepherd, 2 Stra. 1004; Beatty v. Kurtz (dedication of lot on plan "for the Lutheran Church"), 2 Pet. (U. S.) 256; New Orleans v. United States, 10 Pet. 662; Dubuque v. Maloney, 9 Iowa, 450; Kelsey v. King, 33 How. Pr. 89.

to the general rule requiring a grantee.¹ 3. Nor is a deed or writing necessary to constitute a valid dedication; it may be by parol.² 4. No specific length of possession is necessary to constitute a valid dedication; all that is required is the assent of the owner of the soil to the public use, and the actual enjoyment by the public of the use for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment.³

§ 495. Conformably to the foregoing principles, a proposal by a land owner to give, free of charge, and upon certain conditions to be performed by the city, so much of his land as may be required to open or widen a street or

¹ *Town of Paulet v. Clark*, 9 Cranch (U. S.) 292; *New Orleans v. United States*, 10 Pet. 661, 713, 1836, where *McLean*, J., says: "It is not essential that this right of use should be vested in a corporate body; it may exist in the public, and have no other limitation than the wants of the community at large." See, also, *McConnell v. Lexington*, 12 Wheat. 582; *Doe v. Jones*, 11 Ala. 63, 1847; *Vick v. Vicksburg*, 1 How. (Miss.) 879, 1837; *Antones v. Esalava*, 9 Port. (Ala.) 527; *Winona v. Huff*, 11 Minn. 119, 1866. Dedications to the public of streets, commons, &c., may, on the corporation being erected, pass to it by operation of law. *Mayor of Savannah v. Steamboat Company*, R. M. Charl. (Geo.) R. 342, 1830; *Doe v. Jones*, 11 Ala. 63; *Klinkener v. School District*, 1 Jones (Pa.) 444; *Pella v. Scholte*, 24 Iowa, 288, 298; *Canal Trustees v. Havens*, 11 Ill. 554; *Waugh v. Leech*, 28 Ill. 448. If no donee or trustee be named the dedication is valid, and the legislature, as well as chancery, may directly appoint trustees who may recover in ejectment. *Bryant v. McCandless*, 7 Ohio, pt. 2, 135.

² *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 409; *Keen v. Lynch*, 1 Rob. (Va.) 186, 1842; *Dummer v. Jersey City*, 1 Spencer (N. J.) 86, 1843; *Vick v. Vicksburg*, 1 How. (Miss.) 879, 1837; *State v. Catlin*, 3 Vt. 530; *McKee v. St. Louis*, 17 Mo. 184, 1852; *Hunter v. Sandy Hill*, 6 Hill (N. Y.) 407; *Post v. Pearsall*, 23 Wend. 425, 454; *Dover v. Fox*, 9 B. Mon. 200; *Macon v. Franklin*, 12 Geo. 239. A party taking under a partition in which streets were dedicated is estopped to deny dedication. *Wisby v. Boute*, 19 Ohio St. 238.

³ *Jarvis v. Dean*, 3 Bing. 447; *State v. Catlin*, 3 Vt. 530; *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498, 1832; *Saulet v. New Orleans (Square)*, 10 La. An. 81, 1855, *per Ogden*, J.; *Noyes v. Ward*, 19 Conn. 250, 268; 1848; 2 Greenl. Ev. sec. 662; *Denning v. Roome*, 6 Wend. 651; *State v. Marble*, 4 Ire. (Law) 318; *Columbus v. Dahn*, 36 Ind. 330, 1871; *Evansville v. Evans*, 37 Ind. 229, 1871; *Fisher v. Beard*, 32 Iowa, 846, 1871.

Lands, "after being set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law consid-

highway, will, if the proposition be accepted, and the conditions complied with, in a reasonable time, *estop such owner* from claiming damages for his land; a formal vote of acceptance is not necessary; and seasonably fulfilling the conditions of the offer is sufficient.¹ But unless private rights have attached a common law dedication of land for a highway, street, of other public use, may, according to some authorities, be revoked by the owner at any time before there has been an acceptance by formal act of the proper authorities, or by user, as hereinafter explained, but not afterwards.² And a municipal corporation which has accepted a dedication of property to public use may, before vested rights have been acquired under the dedication, with the consent of the dedicator, revoke the acceptance.³

Extent of Dedication as Respects Donor.

§ 496. Where the land is dedicated by the proprietor

ers it in the nature of an *estoppel in pais*, which precludes the original owner from revoking such dedication." *Per Thompson, J.*, in *Cincinnati v. White*, 6 Pet. 431, 437, 1832. As to *irrevocability of dedication*, after other rights have attached, see *Macon v. Franklin*, 12 Geo. 239, 1852; *Haynes v. Thomas*, 7 Ind. 38; *Indianapolis v. Cross*, 1*b.* 9, 12; *Ragan v. McCoy*, 29 Mo. 356; *State v. Catlin*, 3 Vt. 530; *Weisbrod v. Railroad Company*, 18 Wis. 35; *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469; *Lee v. Lake*, 14 Mich. 12. And see the instructive opinion of *Campbell, J.*, in *Baker v. Johnston*, 21 Mich. 319, 1870.

¹ *Crockett v. Boston*, 5 Cush. 182, 1849. Sixteen months considering the matter to be acted upon, and the usual course of proceeding, was not considered an unreasonable time. *Id.* See on this point, *Baker v. Johnston*, 21 Mich. 319.

² *Holdane v. Cold Springs*, 21 N. Y. 474, 1860; *Baldwin v. Buffalo*, 35 N. Y. 375; S. C., 29 Barb. 396. But see *Jersey City v. Morris Canal Company*, 1 Beasl. (N. J.) 547, 1849; *Weisbrod v. Railroad Company*, 18 Wis. 35; *Lee v. Sandy Hill*, 40 N. Y. 442, 1869. Completed dedication by map held not revocable, although not accepted. *M. E. Church v. Hoboken*, 33 N. J. (Law) 13, 1868; *Cook v. Burlington*, 30 Iowa, 94, 1870. So, in California, an acceptance by the public, by a formal act or by actual user, is not necessary to complete a dedication where the intent to dedicate is made out. *Stone v. Brooks*, 35 Cal. 489, 1868. Compare *Baker v. Johnston*, 21 Mich. 319.

As to dedication and revocation of dedication of a strip of land which was a mere *cul de sac*, see *Holdane v. Cold Spring*, 21 N. Y. 474, 1860; S. C., 29 Barb. 108; *Tillman v. People*, 12 Mich. 401; *People v. Jackson*, 7 Mich. 432; *Stone v. Brooks*, 35 Cal. 489, 1868.

³ *Municipality v. Levee Company*, 7 La. An. 270, 1852.

"for the use of the public," this has been considered to show, in the absence of statute to the contrary, an intention to give a mere *easement, and not the fee*. In such case the owner of the land, whether dedicated for the use of a highway, or street, or square, or common, retains his exclusive right in the soil for every purpose of use or profit, not inconsistent with the public easement, and may maintain appropriate actions for any encroachment upon it.¹

§ 497. If land dedicated to a city for public use is

¹ *Lade v. Shepherd*, 2 Stra. 1004; adhered to in the recent case of the Parish, &c. v. Jacobs, 25 Law T. Rep. (N. S.) 800. See, also, *Goodtitle v. Alker*, 1 Burr. 153; *Harrison v. Parker*, 6 East, 154; *Jackson v. Hathaway*, 15 Johns. 447; *Perley v. Chandler*, 6 Mass. 454; *Pomeroy v. Mills*, 8 Vt. 279, 1831; *Abbott v. Mills*, *Id.* 521; *Des Moines v. Hall*, 24 Iowa, 234; *Dubuque v. Maloney*, 9 Iowa, 450, 1859; *Boston v. Richardson*, 13 Allen, 152, 153; *White v. Godfrey*, 97 Mass. 472; *Bliss v. Bull*, 99 Mass. 597. As respects *streets*, some explanation of the doctrine as stated in the text, if not limitations upon it, are suggested in the chapter on Streets. Note remarks of *McLean, J.*, in *Barclay v. Howell*, 6 Pet. 512.

It has been definitely settled by the Court of Appeals in New York, whatever may have been the intimations or decisions in the prior cases, that as between grantor and grantee the conveyance of a lot bounded upon a street in a city, carries, in the absence of legislative provision to the contrary, the land *to the center of the street*, there being no distinction in this respect between the streets of a city and country highways. And the grantee goes to the middle of the street, though the conveyance contains no reference to the street, and the depth of the lot is stated by figures, which would not include any part of the street. *Bissell v. The New York, &c. Railroad Company*, 28 N. Y. 61, 1861, five judges concurring, three others expressing no opinion. *Hammond v. McLachlan*, 1 Sandf. 323, and *Stites v. Curtis*, 4 Day (Conn.) 328, approved. The case of *Bissell v. Railroad Company*, *supra*, approved and followed in *Wager v. Troy, &c. Railroad Company*, 25 N. Y. 526, 1862, and note remark on p. 538, as to fee of streets in city of New York; *S. P. Sherman v. McKeon*, 38 N. Y. 260, 1868. See, also, *Willoughby v. Jenks*, 20 Wend. 96, 1838. Actual possession of lot shows constructive title of occupant to middle of street. *Id.* *John and Cherry Streets*, 19 Wend. 659; *Railroad Company v. Elevator Company*, 50 Pa. St. 499; *Woodruff v. Neal*, 28 Conn. 168, 1859. Effect of *fee* being in city corporation. *People v. Kerr*, 27 N. Y. 188; *Clinton v. Railroad Company*, 24 Iowa, 455. See chap. XVIII. on Streets, *post*, sec. 544.

Notwithstanding a dedication under a statute may pass the fee to the streets and alleys, yet if these are dedicated by a different mode from that prescribed by the statute, the fee remains in the adjacent proprietor as at common law, subject to the public easement. *Manly v. Gibson*, 13 Ill. 312; *Dubuque v. Benson*, 23 Iowa, 248.

bounded by a river, the city has all the rights and privileges of a riparian proprietor as respects alluvial formations or additions; these partake of the same character and are subject to the same use as the soil to which they become united.' Where the shore owner, through whose lands a street comes to the shore, fills in in front of his lands, and also in front of the *terminus* of the street, the public is entitled to the extension of the street the same as if the land filled in were an alluvion.'

Who May Dedicate.—Intent.—How Established.

§ 498. The dedication *must be by the owner of the land, or of an estate therein.*' A municipal corporation

¹ *New Orleans v. United States*, 10 Pet. (U. S.) 661, 1836; *Cook v. Burlington*, 30 Iowa, 94, 1870; *Godfrey v. Alton*, 12 Ill. 29, 1850; *Newport v. Taylor*, 16 B. Mon. 699, 1855. *Ante*, sec. 73. Dedication of streets bordering on navigable water, extends, if there be no limitation, to the water, and, in Alabama, to low water mark, and accretions belong to the public. *Doe v. Jones*, 11 Ala. 68, 1847. The Supreme Court of the United States has decided that the *title* to lands bordering on navigable streams, when derived from the general government, "stops at the stream." *Railroad Company v. Schurmeir*, 7 Wall. 272, 289, 1863. At the "margin of the stream." *Yates v. Milwaukee*, 10 Wall. 497, 504, 1870, *per Miller, J.* This last case refers to and comments on *Yates v. Judd*, 18 Wis. 118; *Martin v. Evansville*, 32 Ind. 85, 1869. See *Wharves*, *ante*, chap. VI; also chap. XV. on Corporate Property, *ante*.

² *Jersey City v. Morris Canal Company*, 1 Beasl. (N. J.) 547, 558, *per Whelpley, J.* See, also, *People v. Lambier*, 5 Denio, 9, 1847; *Henshaw v. Hunting*, 1 Gray, 203; *Cook v. Burlington*, 30 Iowa, 94, 1870. *Dedication of streets, &c. under tide water.* *Morris Canal Company v. Jersey City*, 1 Beasl. (N. J.) 252; S. C. on appeal, *Id.* 547; *Jersey City v. Dummer*, Spenc. (N. J.) 106; *Henshaw v. Hunting*, 1 Gray (Mass.) 203.

³ *Hoole v. Attorney General*, 22 Ala. 190; *Irwin v. Dixon*, 9 How. 10; *Lee v. Lake*, 14 Mich. 12; *Leland v. Portland*, 2 Oregon, 46; *Lownsdale v. Portland*, Deady 1, 89. *Remainder man* not bound by acts of the owner of a particular estate unless his assent can be shown or implied. 2 Smith Lead. Cas. 95; *Detroit v. Railroad Co.*, 23 Mich. 173, 1871. *By agent of owner.* *United States v. Chicago*, 7 How. (U. S.) 185; *Barclay v. Howell's Lessee*, 6 Pet. 498. An agent laid out a town plat with "public square;" the proprietors denied his authority—but it was held, that having conveyed property by adopting his numbers, referring to the "recorded town plat," and "public square," his act was ratified, and these facts were sufficient proof of his authority. *Brown v. Manning*, 6 Ohio, 298, 1834. *By administrator.* *Logansport v. Dunn*, 8 Ind. 378, 1856. Presumption from long use by pub

may, unless restricted, dedicate to public use land of which it is the proprietor.¹ Accordingly, if a town or city owning land in fee, suffer it to remain unenclosed, place a survey of the same on record, describing it as the "town common," and then permit an uninterrupted use of it by the public for a series of years, this will amount to an irrevocable dedication of the land to the public, and the subsequent grantee of the corporation would obtain no title.² But if the title in fee to a piece of land be in the municipal corporation, although it was purchased by it for a market, and constantly used for that purpose for forty years, the land is not thereby dedicated for market purposes, but the market may be changed or abandoned, and the tax payers or others cannot object, since the power to establish and regulate markets is a continuing one, and the land thus used for market purposes may be sold by the corporation.³

§ 499. An *intent* on the part of the owner *to dedicate* is absolutely essential, and unless such intention can be found in the facts and circumstances of the particular case, no dedication exists. Where a plat is made and recorded the requisite intention is generally indisputable. But the intention may also be established by parol evidence of acts or declarations which show an assent on the part of the owner of the land that the land should be used for public purposes. To deprive the proprietor of his land, the intent to dedicate should clearly or satisfactorily appear.⁴

lie against married woman. Schenley v. Commonwealth, 36 Pa. St. 29. *Dedication by married woman.* Todd v. Railroad Company, 19 Ohio St. 514. *Widow not dowerable in property dedicated to public uses.* Gwynne v. Cincinnati (bill for dower in market house), 3 Ohio, 25, 1827; Moore v. Mayor, &c. of New York, 8 N. Y. 110, 1853. *Ante*, sec. 459. Mankato v. Meagher 17 Minn. 265.

¹ Boston v. Lecraw, 17 How. (U. S.) 426; State v. Woodward, 28 Vt. 92, 1850; Wright v. Victoria, 4 Texas, 375; Macon v. Franklin, 12 Geo. 239. Corporation may dedicate. Canal Company v. Hall, 1 M. & Gr. 393; Green v. Canaan, 29 Conn. 157; San Francisco v. Calderwood, 31 Cal. 585.

² State v. Woodward (indictment for enclosing public common), *supra*.

³ Gall v. Cincinnati, 18 Ohio St. 563, 1869. See also, Boston v. Lecraw, 17 How. (U. S.) 426, 1854, cited *ante*, sec. 73, note 1.

⁴ Irwin v. Dixon, 9 How. 10; The President, &c. v. Indianapolis, 12 Ind. 620, 1839; Logansport v. Dunn, 8 Ind. 378; Pennington v. Willard, 1

Effect of Long User and Acquiescence.

§ 500. But such *intent will be presumed* against the owner where it appears that the easement in the street or property *has been used and enjoyed by the public* for a period corresponding with the statutory limitation of real

Rh. Is. 98; Westfall v. Hunter, 8 Ind. 174; Cincinnati v. White, 6 Pet. 435; Wilson v. Saxon, 27 Iowa, 15; Onstott v. Murray, 22 Iowa, 466; Mander-schid v. Dubuque, 29 Iowa, 73; Detroit v. Railroad Co., 23 Mich. 173.

"The doctrine of all the authorities is, that the *intention* to dedicate land to the public use is of the very essence of the act; but this intention may be proved as a fact or inferred from circumstances." *Per Potts, J.*, Smith v. State, 8 Zabr. (N. J.) 712, 725; Lee v. Lake, 14 Mich. 12; Stuyvesant v. Woodruff, 1 *Ib.* 145; Mayo v. Murchie, 3 Munf. (Va.) 358, 1811. May be shown by acts *in pais*. Town Council v. Lithgoe, 7 Rich. (Law.) 435; Angell on Highways, sec. 132.

Proof of dedication and acts which will estop original proprietor or his grantees, with notice, from resuming the lands set apart to the public, consult Commonwealth v. Alburger, 1 Whart. (Pa.) 469; State v. Wilkinson, 2 Vt. 480; Abbott v. Mills, 3 *Ib.* 521; Pomeroy v. Mills, *Ib.* 279; State v. Catlin, *Ib.* 580; State v. Woodward, 23 *Ib.* 92. *Declarations of owner* of soil admissible to show a dedication to public use. State v. Catlin, 3 Vt. 530, 1831; McKee v. St. Louis, 17 Mo. 184; Buchanan v. Curtis, 25 Wis. 99, 1869; Evans v. Evansville, 37 Ind. 229, 1871. *Declarations of deceased surveyor*, at the time of making survey, were admitted as part of the *res gesta*. Barclay v. Howell's Lessee, 6 Pet. 498; referred to by McLean, J., 10 Pet. 714; Birmingham v. Anderson, 40 Pa. St. 506. In an action for obstructing a public alley the plaintiff may show by the acts and declarations of former proprietors that their use and occupation of the alley were for temporary purposes. McKee v. Perchment, 69 Pa. St. 342, 1871.

Where the owner is interested to prove a dedication, he will be held to strict proof. Rector v. Hart, 8 Mo. 448.

Where the dedication is specific and certain, as, for example, the words, "public ground," or "public square," on the recorded plat, *parol testimony* is not receivable to establish or affect the intention of the donors, and therefore, in such a case, the donors cannot show, by evidence *aliunde*, that they designed the square for a court house, and if no court house should be erected, then to resume it, or appropriate it to a seminary of learning. Brown v. Manning, 6 Ohio, 298, 1834. *Contra*, Westfall v. Hunt, 8 Ind. 174, but *quare*, as to competency of the parol evidence to show the intent. See Indianapolis v. Croas, 7 Ind. 9; Cincinnati v. Hamilton County, 7 Ohio, part 1, 88, dedication "for public uses,"—contest between city and county; Lebanon v. Commissioners ("public ground" contest as to square between town and county), 9 Ohio, 80. See Darlington v. Commonwealth, 41 Pa. St. 68.

actions. But where there is no other evidence against the owner to support the dedication but the *mere fact* of such user,¹ so that the right claimed by the public is purely prescriptive, it is essential to maintain it, that the user or enjoyment should be adverse, that it is with claim of right, and uninterrupted and exclusive for the requisite length of time; but when it is said that it must be uninterrupted, this refers to the *right*, and not simply to an interruption, of the *use*.²

§ 501. But where the question is as to an *intent* on the part of the owner *to dedicate, user by the public* for a period less than that limiting real actions, is important as evidence of such intention, and as one of the facts from which it may be inferred. Where the *animus dedicandi* is established, no user for any definite period by the public is necessary.³

¹ Remington v. Willard, 1 Rh. Is. 98, 1847; Thayer v. Boston, 19 Pick. 511, 1837; Talbott v. Grace, 80 Ind. 389, 1868; Keyes v. Tait, 19 Iowa, 123; Detroit v. Railroad Company, 28 Mich. 173; Green v. Oaks, 17 Ill. 249; Smith v. State, 3 Zab. 180; affirmed, *Ib.* 712; Onstott v. Murray, 22 Iowa, 457, 1867, where conflict in the cases is noticed, and where it is held, that if the public, with the knowledge of the owner of the land, even though it be unenclosed timber or prairie land, has claimed and exercised the right of using the same for a public highway for a period equal to that fixed by the statute limiting real actions, the public right is complete, unless such use be by favor or leave of the owner. Mandershid v. Dubuque, 29 Iowa, 73. In Pennsylvania, the Supreme Court holds the law to be, "that the use of ground by the public as a highway for more than twenty-one years makes it a public road just as effectually as though it had originally been laid out and opened by the proper authorities." *Per Knox, J.*, Commonwealth v. Cole, 26 Pa. St. 187, 1856; Thayer v. Boston, 19 Pick. 511, 514, *per Shaw, C. J.* And the same principle is adopted as to sidewalks and streets. Bush v. Johnson, 28 Pa. St. 209, 1854. It is held in Massachusetts that a *town way* can only be established in the mode prescribed by statute; though a town may acquire a right of way by grant or user, it will be a private way, and obstructions to it not indictable. Commonwealth v. Low, 3 Pick. 406, 1826. But see Commonwealth v. Belden, 18 Met. 10, 1847; State v. Bradbury, 40 Maine, 154, 1855; State v. Wilson, 42 Maine, 9, 1856.

² 2 Greenl. Ev. tit. Prescription, sec. 537-546.

³ Hoole v. Attorney General, 22 Ala. 190; Boyer v. State, 16 Ind. 451; Evansville v. Paige, 23 Ind. 525; Cincinnati v. White, 6 Pet. 481; Barclay v. Howell, 6 Pet. 498; Irwin v. Dixon, 9 How. 10; State v. Wilkinson, 2 Vt. 480; Hunter v. Sandy Hill, 6 Hill, 407. Proof by user. See Gamble v. St. Louis, 12 Mo. 617; Lewis v. San Antonio, 7 Texas, 288; New Orleans v.

"No particular time," says an English judge, "is necessary for evidence of a dedication. If the act of dedication be unequivocal, it may take place immediately. For instance, if a man build a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is *instantly* a highway.'"

§ 502. A street may be *widened* by the dedication of a strip of land adjoining it, and such dedication may be shown by long use by the public, and acquiescence in such use by the owner. And if a street has been long used and built upon to a particular line, which line has been acquiesced in by the adjoining owners, who have built and made improvements to correspond with such line, such owners and the public acquire rights in consequence, and one or more of such owners cannot afterwards change or narrow the street by showing that the original survey made the line of the street different from that which had been long regarded, built upon and acquiesced in as the line of the street.'

United States, 10 Pet. 661, 722; Weisbrod v. Railroad Company, 18 Wis. 35; Doe v. Jones, 11 Ala. 68, 1847; 2 Smith Lead. Cas. 95; Onstott v. Murray, 22 Iowa, 457; Pella v. Scholte, 24 Iowa, 283; Saulet v. New Orleans, 10 La. An. 81.

What acts will repel presumption of dedication arising from owner's knowledge of the use by the public. Durgin v. Lowell, 3 Allen, 398; Skeen v. Lynch, 1 Rob. (Va.) 186, 194; Roberts v. Karr, 1 Campb. 262, note; *Id.* 263, note; Schoemaker v. Church, 5 How. Pr. 265; 3 Smith Lead. Cas. 176. Upon the question of dedication, *non-user* is important, but not conclusive, evidence against the public. Barclay v. Howell's Lessee, 6 Pet. 498. Concurrence of all the owners interested in an alley essential to establish an *abandonment* of it. McKee v. Perchment, 69 Pa. St. 342, 1871. Effect of *occupancy by alleged dedicat*or. Cook v. Hillsdale, 7 Mich. 115, 1859; Peoria v. Johnson, 56 Ill. 45, 1870.

¹ Woodyer v. Hadden, 5 Taunt. 125, *per Chambre, J.*; 2 Smith Lead. Cas. 176.

² Smith v. State, 3 Zab. (N. J.) 712, 1852; affirming S. C., *Id.* 130. In this case the different owners had acquiesced in the line built upon, and treated it as the true line for forty or fifty years. The defendant, disregarding this line, built out into the street some four or five feet. He was indicted for the nuisance thus created, and convicted, the court holding the rights of the public had attached, and that it was no defense to show that the building erected was on the line of the street as originally surveyed. A

Effect of Platting and Sale of Lots.

§ 503. While a mere survey of land, by the owner, into lots, defining streets, squares, &c., will not, without a sale, amount to a dedication,¹ yet *a sale of lots with reference to such plat*, or describing lots as bounded by streets, will amount to an immediate and irrevocable dedication of the latter, binding upon both vendor and vendee.²

road or street which becomes a public highway by user is of no established *width* by law; its width, as used at the time when the rights of the public become complete, is the established or legal width of the highway. *Hart v. Township*, 15 Ind. 226, 1860; 5 *Id.* 459. See *Darlington v. Commonwealth*, 41 Pa. St. 63.

¹ *United States v. Chicago*, 7 How. (U. S.) 185, 196.

² *Rowan v. Portland*, 8 B. Mon. 232, 1847; *Augusta v. Perkins*, *Id.* 207; *County v. Newport*, 12 *Id.* 588; *Wickliffe v. Lexington*, 11 *Id.* 155; *Newport v. Taylor*, 16 *Id.* 699, 1855; *Stone v. Brooks*, 35 Cal. 489, 1868; *Cook v. Burlington*, 30 Iowa, 94, 1870; *Fisher v. Beard*, 32 Iowa, 346, 1871; *Wiggins v. McCleary*, 49 N. Y. 346; *Preston v. Navasota*, 34 Texas, 684, 1871; *Hannibal v. Draper*, 15 Mo. 634, 1852; *Schenley v. Commonwealth*, 36 Pa. St. 62, 1859; *Doe v. Attica*, 7 Ind. 641, 644, 1856; *Wyman v. New York*, 11 Wend. 487; *Livingston v. New York*, 8 Wend. 85; *Davis v. Sabita*, 63 Pa. St. 90, 1869; *McKee v. Perchment*, 69 Pa. St. 342, 1871; *Portland v. Whittle*, 3 Oregon, 126, 1869; *McKenna v. Commissioners, Harper (South Car.)*, Law, 381; *White v. Cower*, 4 Paige, 510; *Barclay v. Howell*, 6 Pet. 498, 506; 10 *Id.* 718; *Town Council v. Lithgoe*, 7 Rich. (Law) 435; *Dubuque v. Maloney*, 9 Iowa, 450; *Pope v. Union*, 18 N. J. Eq. 282. Purchaser's right extends to have *all streets, &c.*, remain public which were marked on the plan exhibited by the proprietor. *Rowan v. Portland*, 8 B. Mon. 232, 1847; *Winona v. Huff*, 11 Minn. 119; *Huber v. Gazley*, 18 Ohio, 18; 2 *Smith Lead. Cas.* 181; *Logansport v. Dunn*, 8 Ind. 378; *Dubuque v. Maloney*, *supra*. Effect of sale by plat as to the rights of the public. *Detroit v. Railroad Co.*, 23 Mich. 173, 1871; *Evans v. Evansville*, 37 Ind. 229; *Baker v. Johnston*, 21 Mich. 319, 1870; *Hawley v. Baltimore*, 33 Md. 270, 1870; *West Cov. v. Freking*, 8 Bush. (Ky.) 131; *Arrow-smith v. New Orleans*, 24 La. An. 194.

So, in Maryland, it is laid down, "that where a party sells property lying within the limits of the city, and in the conveyance bounds such property by streets designated *as such* in the conveyance, or on a map made by the city, or by the owner of the property, such a sale implies, necessarily, a covenant that the *purchaser* shall have the use of such streets." *Moale v. Baltimore*, 5 Md. 314, 321, 1854; following, *White v. Flannigan*, 1 Md. 525, 540, 1852; distinguished from *Underwood v. Stuyvesant*, 19 Johns. 186; *Howard v. Rodgers*, 4 Harr. & Johns. 278.

Dedication where the conveyance bounds the purchasers by a street or

§ 504. A dedication of land for a public square *was not*, under the circumstances of the case, *implied* against the heirs of the grantor from its representation as a *mere blank*, undistinguished from, and continuous with, the streets surrounding it, upon a partition map made by such heirs, and by reference to which they conveyed lots.¹

Acceptance by the Public—When, and for What Purpose, Necessary.

505. As against the proprietor, a dedication of land for streets and highways may be complete without any act or acceptance on the part of the public; but in order to charge the municipality or local district with the duty to repair, or to make it liable for injuries for suffering the street or highway to be or remain defective, there must be an *acceptance* of the dedication. And this acceptance must be by the *proper or authorized* local public authorities. It may be express and appear of record, or it may be implied from

public square, designated on a map, see *People v. Lambier*, 5 Denio, 9, 19; *Thirty-second street*, 19 Wend. 128; followed in *Twenty-ninth street*, 1 Hill, 189; *Ib.* 191; *Furman street*, 17 Wend. 649; 8 *Ib.* 85; 20 *Ib.* 96; 2 Seld. 257; 6 Ohio, 298; *Smith v. Lock*, 18 Mich. 56, 1869; *M. E. Church v. Hoboken*, 33 N. J. (Law) 13, 1868.

¹ *Mayor, &c. of New York v. Stuyvesant*, 17 N. Y. 34, 1858. Mere unnumbered triangular space in plat, bounded by streets, without user by the public or other evidence of public right, held not to establish a dedication of such space as a common. *Oswald v. Grenet*, 15 Texas, 118, 1855.

Mode of platting, and peculiarities of lines and spaces on plats as showing an intention to dedicate, or the reverse. See *Saulet v. New Orleans*, 10 La. An. 81; *Yates v. Judd*, 18 Wis. 118; *Municipality v. Palfrey*, 7 La. An. 497; *Livandais v. Municipality*, 5 *Ib.* 8; *Xiquer v. Bujac*, *Ib.* 499; *Barclay v. Howell's Lessee*, 6 Pet. 498. *Water Street*, with open space on river side. 10 Pet. 714. Opposite case with both lines of *Water street* defined and width indicated. *McLaughlin v. Stevens*, 18 Ohio, 94, 1849, distinguished from *Barclay v. Howell's Lessee*, *supra*; *United States v. Chicago*, 7 How. 185; *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469; *Penny Pot Landing Case*, 16 Pa. St. 79; *Commonwealth v. McDonald*, 16 Serg. & Rawle, 390; *Cowles v. Gray*, 14 Iowa, 1; *Grant v. Davenport*, 18 Iowa, 179; *Perrin v. Railroad Company*, 36 N. Y. 120; *Cook v. Hillsdale*, 7 Mich. 115, 1859; *Newport v. Taylor*, 16 B. Mon. 699, 1855; *Baker v. Johnston*, 21 Mich. 319; *Van Valkenburgh v. Milwaukee*, 30 Wis. 338; *Columbus v. Dahn*, 330, 1871.

repairs made and ordered, or knowingly paid for by the authority which has the legal power to adopt the 'street or highway,' or from long user by the public.'

¹ *State v. Wilson*, 42 Maine, 9, 1856; *State of Maine v. Bradbury*, 40 Maine, 154, where it was held, that as a *surveyor* of highways had no power to accept a dedication, repairs made by him did not constitute an acceptance binding upon the town. *Oswego v. Oswego Canal Company*, 2 Seld. 257; *Remington v. Millard*, 1 Rh. Ia. 93; 2 *Id.* 172, 498; *State v. Carver*, 5 Strob. (South Car.) 217; *Jennings v. Tisbury*, 5 Gray, 73; *Kelly's Case*, 8 Gratt. (Va.) 632; *Bowman v. Boston*, 5 Cush. 1; *Hyde v. Jamaica*, 27 Vt. 443; *Folsom v. Underhill*, 36 Vt. 580; *Commonwealth v. Belden*, 13 Met. 10; *Curtis v. Hope*, 19 Conn. 154; 2 Greenl. Ev. sec. 662. See, on this subject, *Hobbs v. Lowell*, 19 Pick. 415; *Teagarden v. McBean*, 33 Miss. 283; *Sampson v. Justices*, 5 Gratt. (Va.) 241, 1848; *Holmes v. Jersey City*, 1 Beasl. (N. J.) 299; *Jersey City v. State*, 1 Vroom, 521; *State v. Johnson*, 11 Ire. (Law) 647, 659; *Pope v. Union*, 3 C. E. Green. Proof of acceptance of street by town council digging a well therein. *Town Council v. Lithgoe*, 7 Rich. (Law) 435. Other proof of adoption. *Blodgett v. Royalton*, 17 Vt. 40; *Detroit v. Railroad Company*, 23 Mich. 173; *Baker v. Johnson*, 21 Mich. 319; *Shurtle v. Minneapolis*, 19 Minn. 308, 1871; *Emery v. Washington*, 1 Brayton (Vt.) 128; *Parsons v. Trustees, &c.*, 44 Geo. 529; *Rose v. St. Charles*, 49 Mo. 509, 1872. In Michigan it has been several times decided, that an acceptance of a plat containing streets, &c., by the proper authorities, in behalf of the public, was essential to a complete dedication. *People v. Jones*, 6 Mich. 176; *Tillman v. People*, 12 Mich. 401; *Baker v. Johnston*, 21 Mich. 319. In Connecticut the whole matter of the dedication and acceptance of highways and streets, there being no statute on the subject, rests on the principles of the common law, and the reasonable doctrine is maintained that an acceptance by the public will be presumed when clearly beneficial, of which the actual use will be strong evidence; but a reasonable time is to be allowed for such acceptance; and in the case of a city street opened for settlement upon it, a reasonable time would be the time required for the settlement of the adjoining lots. *Guthrie v. New Haven*, 31 Conn. 308, 1863. The acceptance, on the part of an incorporated town or city, of an amended charter, which includes an addition previously laid off and platted, amounts to an acceptance of such addition and the streets and alleys therein. *Des Moines v. Hall*, 24 Iowa, 234, 1868; *Requa v. Rochester*, 45 N. Y. 129, 1871. Under the Ohio municipal corporations act, a city cannot be charged with the duty of repairing streets dedicated, unless its assent to the dedication be given. *Wisby v. Boute*, 19 Ohio St. 238; *Requa v. Rochester* (construction of charter), 45 N. Y. 129.

² *Commonwealth v. Belden*, 13 Met. 10, 1847; *Hemphill v. Boston*, 8 Cush. 195, 1851; *Jennings v. Tisbury*, 5 Gray, 73, 1855; *Hayden v. Attieborough*, 7 Gray, 338; *Manderschid v. Dubuque*, 29 Iowa, 73, in which the subject is well discussed by Mr. Justice *Beck*. See, also, *State v. New Boston*, 11 N. H. 413, where the court says that "an express, formal dedication to the public, an acceptance by some public agent properly au-

Public Squares and their Uses.

§ 506. Taking private property for a *public square*, in a city, is taking the same for *public use*, and it may law-

thorized, or by *long use* of the public, would, upon the authorities, constitute a public highway; though, unless there had been an acceptance, express or implied, it seems the road would not become a highway." By mere user alone, there being no element of dedication, and no acceptance or facts from which it can be implied, the land does not become a *public* highway, unless the user is continuous for the full statutory period; user alone for a less period is not sufficient to charge the public with the duty to repair, imposed by statute. See *Jennings v. Tisbury*, 5 Gray, 78, 1855; *Rowell v. Montville*, 4 Greenl. 270; *State v. Bradbury*, 40 Maine, 154, 1855; *State v. Wilson*, 42 Maine, 9, 1856; *Commonwealth v. Low*, 3 Pick. 408, 1826, and comments on in *Commonwealth v. Belden*, 13 Met. 10, 15, 1847; *Commonwealth v. Charlestown*, 1 Pick. 179, 1822; *Reed v. Northfield*, 13 Pick. 94, 1832; *Jones v. Andover*, 9 Pick. 146, 1829; *Remington v. Millard*, 1 Rh. Is. 93. If not a public highway, a party is not indictable for obstructing it, or a town for neglecting to repair it. *Hemphill v. Boston*, 8 Cush. 195; *State v. Bradbury*, 40 Maine, 154; *Commonwealth v. Low*, 3 Pick. 408; *Commonwealth v. Belden*, 13 Met. 10, 15; *State v. Richmond*, 1 Rh. Is. 49. *Post*, sec. 745.

The principles in the text are well illustrated by the case of the *State v. Carver*, 5 Strob. (South Car.) Law, 217, 1850, where the defendant was indicted for obstructing two streets in an addition to a town. The streets were designated on a plat by the proprietor, and the defendant's lots were bounded thereby. Other parties were interested in the same dedication, and, against their protest, defendant fenced up the streets in front of his lots. These had never been accepted by the town authorities, or worked upon. It was held that the defendant could not be convicted on this evidence, and that the mere assertion of the public right to the streets by the prosecuting officer of the state, by indictment for their obstruction, was not sufficient. The court, admitting that there was a dedication so far as the proprietor, by any act of his, could effect it, remarked that, "it is very clear, from the authorities, that without some act of acceptance or some use by the public, the owner of the land cannot create a street in a town, or a public road in the country. The reason is very clear. The opening and repairing of streets and roads impose an expense on the public, and [in this state, *Commissioners v. Taylor*, 2 Bay, 282] subject the authorities, whose duty it is to repair, to indictment for neglect of duty. Now this charge and liability can only be imposed by law, but, if the simple act of dedication could impose them, then they would be imposed, not by law, but by the will of an individual. All the cases both English and American, sustain these positions. *Rex v. Inhabitants of Leake*, 5 Barn. & Adol. 469, does not decide that there need be no acceptance; it decides only that where a road had been established, by use, as a public road, the parish was bound

fully be done on compensation being made; and the mode of compensation, whether by a tax upon the whole city, or upon those specially benefited, is a matter for legislative regulation.¹

§ 507. The doctrine of dedication to public uses has also been extended and applied to *public squares* in cities and villages, these being regarded as easements for the benefit of the public; and the fact of dedication may be established in the same manner as in the case of highways and streets.²

to repair, without any act of adoption. The use by the public was the same as adoption by the parish." Followed, *Town Council v. Lithgoe*, 7 Rich. (South Car.) Law, 435, 1854. Liability of public to repair, adopted as test to determine whether a road is public or private. *Teagarden v. McBean*, 33 Miss. 283; *State v. Gregg*, 2 Hill (South Car.) 368; *Smith v. Kinard*, *Id.* 642.

¹ *Owners, &c. v. Mayor, &c.*, 15 Wend. 374, 1836; *Bouton v. Brooklyn*, 15 Barb. 375, 384 (as to assessment for *park*). See chapter on Eminent Domain, *ante*, and on Taxation, *post*.

² *Commonwealth v. Rush*, 14 Pa. St. 186, 1850; *State v. Wilkinson*, 2 Vt. 480. Indictment for obstructing public square of St. Albans by a building. *Abbott v. Mills*, 3 Vt. 521; *State v. Catlin*, *Id.* 530, as to Burlington Common, or Court-House Square, and College Green; *State v. Trask*, 6 Vt. 355; *Watertown v. Cowen*, 4 Paige Ch. (N. Y.) 510, as to village square laid out by proprietor, following the doctrine of *Cincinnati v. White*, 6 Peters, 431; *Huber v. Gazley*, 18 Ohio, 18; *Leclercq v. Gallipolis*, 7 Ohio, pt. 1, 88; *Pearsall v. Post*, 20 Wend. 111, 117; S. C., 22 Wend. 425, 433, 451, 454; *Winona v. Huff*, 11 Minn. 119; *Doe v. Attica*, 7 Ind. 641; *Heirs of Reynolds v. Commissioners, &c.*, 5 Ohio, 204 (donation for "county buildings"); *Smith v. Heuston* (donation for "public [county] buildings"), 6 Ohio, 101; *Brown v. Manning* ("P. Square"), 6 Ohio, 298; *Lebanon v. Commissioners, &c.* ("public ground"), 9 Ohio, 80; *Dover v. Fox*, 9 B. Mon. 200; *Baker v. Johnston* ("public square"), 21 Mich. 319, 1870; *Daniels v. Wilson* ("reserved public square"), 27 Wis. 492, 1871.

"Whenever a public square or common is marked out or set apart as such by the owners, and individuals are induced to purchase lots or lands bordering thereon, in the expectation held out by the proprietor that it should so remain; or even if there are no marks upon the ground, but a map or plan is made and lots marked thereon and sold as such, it is not competent for the proprietors to disappoint the expectations of the purchasers by resuming the lands thus set apart and appropriating them to any other use." *Per Williams, J.*, in *Abbott v. Mills* (Court-House Square), 3 Vt. 526; *Price v. Thompson*, 48 Mo. 363.

Nature and effect of a conveyance of land to trustees, with an election to them to dedicate as a public square or not, as they might see fit, see *Mayor, &c. of New York v. Stuyvesant*, 17 N. Y. 34, 1858; 11 Paige, 414.

§ 508. Where the words "public square" are used on a plat, this is an unrestricted dedication to public use,¹ and the use varies according to circumstances, to be judged of and directed by the proper local authorities or corporate guardian, subject to the control of the laws and the courts.²

Conveyance on condition that the land be used only for a *town house*. *French v. Quincy*, 3 Allen, 9.

The conveyance of a block of ground for the use of the public as a "*court-house square*," creates a trust which is not executed by a sale of the block or a portion of it, and the application of the proceeds to the erection of a court-house. *County Commissioners v. Lathrop*, Supreme Court of Kansas, 1872. The words "county block," marked across a block on a town plat, held not a sufficient dedication to the county under the *statutes of Minnesota*. *County Commissioners v. Dayton*, 17 Minn. 260, 1871.

¹ *Commonwealth v. Rush*, 14 Pa. St. 186, 1850; *Commonwealth v. Bowman*, 3 Barr, 203; *Alton v. Transportation Company*, 12 Ill. 60.

"Squares," says *Bohn*, in his *Handbook of London*, 1854, "are an excellent feature, peculiar to the large towns of England, but more particularly to London, being distinguished from the *Piazzi*, *Plazas*, *Places*, &c. of continental cities, by having originated in a sacrifice of building ground, not to the purposes of ornament and architectural beauty, but to the pure necessity for ventilation." Quoted by *Read, J.*, in his interesting opinion in *Baird v. Rice*, 63 Pa. St. 489, 497, 1871, where he traces the history of the public squares of Philadelphia and states the nature of the uses for which they were dedicated by Penn.

"Place," as used in plats of towns, "is a French word, and means a public place surrounded by buildings, kept open for the embellishment of a city or the convenience of its commerce." *Per Preston, J.*, in *Xiques v. Bujac*, 7 La. An. 499, 510, 1852; *Langley v. Gallipolis*, 2 Ohio St. 107. *Indefinite location*. *Ring v. Schoenberger*, 2 Watts, 23.

² *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469, *per Sergeant, J.*; referred to by *Gibson, C. J.*. *Commonwealth v. Bowman*, *supra*; *Baker v. Johnston*, 21 Mich. 319, 1870, where *Campbell, J.*, discusses this subject. *Baird v. Rice*, 63 Pa. St. 489, 1871. In this case *Read, J.*, traces the history of the public squares in Philadelphia dedicated by Penn "for like uses as the Moorfields in London" and the centre square for *buildings and public concerns*, and it was held that the legislature might vacate streets in this latter square and authorize the erection of a court-house and municipal buildings thereon, since this was in effect nothing more than a legislative appropriation of the square and streets to the purposes for which the square was originally dedicated. The right to erect a *public library building* upon "Center Park in section 7 of the City of Detroit" was sustained as a use which fell within the particular dedication, the history of which is traced by *Campbell, J.*, and the power of the legislature and the municipality over the purposes for which public places may be used, discussed. *Riggs v. Bd of Education of Detroit*, Mich. Sup. Court, 1873, not yet reported.

The local authorities have, however, no implied power to authorize private dwelling houses or other private structures to be erected thereon, and, if erected, they are public and indictable nuisances.¹ It has been held, that, under circumstances, the corporate authorities may authorize the use thereof for public buildings, but the right to erect county buildings upon the public square of a county town, is regarded by Chief Justice *Gibson* as resting alone on a usage which, in Pennsylvania, "has acquired the consistence of law."

¹ *Commonwealth v. Rush*, 14 Pa. St. 186; *State v. Atkinson*, 24 Vt. 448, 1852; *Hutchinson v. Pratt*, 11 Vt. 402, 423, *per Williams*, C. J.; *Pomeroy v. Mills*, 3 Vt. 279; *State v. Woodward*, 23 Vt. 92, 1850; *Columbus v. Jacques* (market-house in street), 30 Geo. 506; *State v. Mobile*, 5 Port. (Ala.) 279; *People v. Carpenter*, 2 Doug. (Mich.) 273, 1849; *Cooper v. Alden*, Harring. Ch. (Mich.) 72. As to erections, under the civil law, upon lands dedicated to public use, see *New Orleans v. United States*, 10 Pet. 661, 725, 735, *per McLean*, J.

² *Langley v. Gallipolis*, 2 Ohio St. 107, 110, 1853, *per Bartley*, C. J.; *Commonwealth v. Bowman*, 3 Pa. St. 203, 1846. In this case the defendants were indicted for occupying, by authority from the county commissioners, a building upon the square (dedicated without restriction) of an incorporated town. *Gibson*, C. J., said: "The public square is as much a highway as if it were a street, and neither the county nor the public can block it up, to the prejudice of the public or of an individual. * * It is dedicated to the use of all of the citizens as a highway, and all have a right to pass over it without unreasonable let or hindrance—in which respect it differs from the public squares in Philadelphia, which are dedicated to health and recreation, and which are necessarily subjected to regulation by the local authorities." The case, however, recognizes the right of the county to reasonable accommodation for its court house and public offices in the great square of the county town, the foundation of this right being, as expressed by *Gibson*, C. J., "one of the usages of our state, which has acquired the consistence of law." The extent of the right is limited to the single purpose sanctioned by the usage. *Commonwealth v. Bowman*, 3 Pa. St. 203, 1846. In Indiana, it is said by *Davison*, J., *arguendo*, in *Westfall v. Hunt*, 8 Ind. 174, that "the phrase, 'public square,' when used in our statutes—as also in its popular import—refers almost exclusively to grounds occupied by the court house and owned by the county." Control of public square within the limits of the city corporation, on which a court house and jail were situated, held to be in the city authorities, against whose ordinance the county authorities could not create a nuisance by the erection of horse-racks thereon. *Samuels v. Nashville*, 3 Sneed (Tenn.) 298, 1855.

Respective rights of *city* and *county* in square, and effect of abandonment by county. *County v. Newport*, 12 B. Mon. 538, 1951; *Augusta v. Perkins*, 8 Ib. 207; *Rutherford v. Taylor*, 38 Mo. 315.

§ 509. The *uses and purposes* of a *public square* or *commons* are, in some respects, different from those of a *public highway*. Thus, a street or highway cannot be enclosed by the local authorities. But a public square or common in a town or city where the dedication is general, and without special limitation or use, may be enclosed, notwithstanding it has remained open many years, and be improved and ornamented for recreation and health. But the place must, for the purpose of the dedication, remain free and common to the use of all the public.¹

Dedication for Other Purposes.

§ 510. Property may also be dedicated in writing or by parol, to other municipal, public, or charitable uses, such as church squares or lots;² for a burying-ground;³ for

¹ Langley v. Gallipolis, 2 Ohio St. 107, 1853. See Baker v. Johnston, 21 Mich. 319.

May be enclosed and ornamented. Hutchinson v. Pratt, 11 Vt. 402, 423, 1839, where Williams, C. J., points out some of the differences between public squares and commons and highways. Leftwich v. Mayor, 14 La. An. 152, 1849. In this case, Merrick, C. J., observes: "As a public square is not designed as a highway or thoroughfare for all sorts of conveyances, but is intended as an ornament of a town and place of recreation and amusement, the corporate authorities may enclose the same." Compare remarks of Gibson, C. J., in Commonwealth v. Bowman, *supra*, sec. 508, note. See, also, Baird v. Rice, 63 Pa. St. 489, 1871.

"Square" defined. M. E. Church v. Hoboken, 33 N. J. Law, 13, 1866; Baird v. Rice, *supra*.

"By a 'town common,' in common parlance, is understood an enclosed or unenclosed place belonging to the town, and in which no individual has a private property." *Per Gaston, J.*, in Commissioners v. Boyd, 1 Ire. (Law) 194, 1840.

Ferry right of riparian donor on the dedicated front or commons recognized as reserved by him by reason of long user and acquiescence therein by the public. Newport v. Taylor, 16 B. Mon. 699, 1855. As to ferries, see *ante*, chap. VI.

² Antones v. Eslava, 9 Port. (Ala.) 527, 1839; Hannibal v. Draper, 15 Mo. 634, 1852. Church lots on plat held to be a dedication for a public purpose, in which the municipality has an interest, and can eject the dedicator or his grantee. But Mr. Chief Justice Eustes' opinion is, that by such

³ Hunter v. Sandy Hill, 6 Hhl (N. Y.) 407, 1844; criticised, 2 Smith Lead. Cas. 4th ed. 193. See, also, Post v. Pearsall, 22 Wend. 425, 454.

markets;' for public buildings;' for school purposes;' and for purposes of recreation and ornament.' But the use must be a public one.'

§ 511. Lands dedicated to the public, without restriction, upon the *margin of a navigable river*, may be used for a *landing or wharf*, as well as purposes of passage.'

a designation the property is not *locus publicus*, but private. *Xiques v. Bujac*, 7 La. An. 449. In this case, relating to "Annunciation Place," or "Square," the civil law relating to dedication—and particularly dedications for church purposes—is very fully considered.

Under general dedication of "Church Square," what church entitled. *Christian Church v. Scholte*, 2 Iowa, 27; *Chapman v. Gordon*, 29 Geo. 250; *Beatty v. Kurtz*, 2 Pet. C. C. R. 566; *Shapleigh v. Pillsbury*, 1 Greenl. (Me.) 271, 280; *Rice v. Osgood*, 9 Mass. 38; *Pearsall v. Post*, 20 Wend. 111, 118, *per Cowen, J.*

¹ *Dummer v. Jersey City*, 1 Spencer (N. J.) 86, 1848; *The President, &c. v. Indianapolis*, 12 Ind. 620.

² *Heirs of Reynolds v. Commissioners*, 5 Ohio, 204; *Smith v. Hueston*, 6 Ohio, 101; *Ib.* 298, 305.

³ *Klinkener v. School District*, 11 Pa. St. 444.

⁴ *Pella v. Scholte*, 24 Iowa, 283. The words on a plat, "*Garden Square*," held not necessarily to imply a dedication. *Ib.* So of the words, "*Spencer Square*." *Logansport v. Dunn*, 8 Ind. 378. Square marked "*Coliseum*." *Livandais v. Municipality*, 16 La. 512; *Xiques v. Bujac*, 7 La. An. 499; *Cox v. Griffin*, 18 Geo. 728. The word "*Park*" on plat construed. *Perrin v. Railroad Company*, 36 N. Y. 120; *Price v. Thompson*, 38 Mo. 363. In this last case it was held that under the statute of Missouri, respecting the dedication of property to public use, the corporate authorities of a town could not, against the objection of the adjoining lot owners, *lay out a street through a public park*, as this was a diversion of the use. Whether they could do this under the delegated power of eminent domain on payment of damages was not determined. *Uses of public park*. *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 240, 1871. *Ante*, secs. 463, 464. If a *street runs through the public square* the council of the city cannot direct it to be fenced up unless specially authorized. *Portland v. Whittle*, 3 Ore. 126, 1869. Rights of adjacent owners. See chapter on Streets, *post*.

Servitudes of view arising from dedication to public use. *French v. Railroad Company*, 2 La. An. 80.

⁵ *Todd v. Railroad Company*, 19 Ohio St. 514. Marking on plat a lot, "Depot of O. & P. Railroad," does not dedicate it. *Ib.* *S. P. McWilliams v. Morgan*, Ill. Supreme Court, January, 1872, not yet reported.

⁶ *Newport v. Taylor*, 16 B. Mon. 699, 1855; *Post*, sec. 558, note; *Godfrey v. Alton*, 2 Ill. 29, 1850; *Alton v. Transportation Company*, 12 Ill. 60; *Mayor v. Wright*, 6 Yerg. (Tenn.) 497, 1834. In this last case it was held, that a

Upon the adjudged cases there exists some doubt whether the public can prescribe for or claim, by way of implied or common law dedication, land for a *public landing*. There may be an express dedication for this purpose, and, on principle, within the limits of a municipality bordering on navigable waters, it would seem to be going too far to say, that in no case can a common law dedication of land for a public wharf or landing be shown by user, and the proprietor estopped from denying the right of the public to such use.¹

Alienation and Change of Use.

§ 512. A municipal corporation has no *implied or incidental authority to alien* or dispose of, for its own benefit, property dedicated to or held by it in trust for the public use, nor can it extinguish the public uses in such property, nor is such property subject to the payment of the debts of the municipality.²

part of the *public promenade* might, by the direction of the city, be converted into a landing or wharf. The opinion asserts, *arguendo*, a measure of power in the corporation over the public property entirely too broad. As to wharves, see *ante*, chap. V. sec. 87, *et seq.*

¹ Denying that the principle of implied dedication of public ways, squares, &c., by long user and acquiescence, extends to *public landings*, see *Pearsall v. Post*, 20 Wend. 111, 1838; affirmed, 22 Wend. 425. In these cases the history and nature of dedications to public uses are learnedly considered, and the numerous cases collected, digested, and commented on. Same principle, *Bethum v. Turner*, 1 Greenl. (Me.) 111; *State v. Wilson*, 42 Maine, 9, where the *nature* of landings and the respective rights of the owner of the soil and the public are elaborately considered. *Littlefield v. Maxwell*, 31 Maine, 134. But that there may be a prescriptive right to, or a dedication of, public landings, see *Penny Pot Landing*, 16 Pa. St. 79, 1851; *Coolidge v. Learned*, 8 Pick. 504; *Municipality v. Kirk*, 5 La. An. 34.

The words, "*reserved landing*," on proprietor's recorded plat, held to indicate intention not to dedicate. *Grant v. Davenport*, 18 Iowa, 179; *Cowles v. Gray*, 14 Iowa, 1. Where land is dedicated as a "commons" along a navigable street, the public authorities may build wharves. *Newport v. Taylor*, 16 B. Mon. 699, 1855. "Levee." *Mankato v. Meagher*, 17 Minn. 265, 1871. Reservation for "highway and other public uses." *Cook v. Burlington*, 30 Iowa, 94, 1870. *Post*, sec. 558, n.

² *M. E. Church v. Hoboken*, 83 N. J. Law, 13, 1868; *Augusta v. Perkins*, 3 B. Mon. 437; *Buckner v. Augusta*, 1 A. K. Marsh. 9; *Alves v. Henderson*, 16 B. Mon. 131, 168, 1855; *Kennedy v. Covington*, 8 Dana, 50; *Rutherford*

§ 513. How far the *legislature has the power* to confer upon the municipality authority to dispose of lands held for such purposes is a more difficult question, and depends, we should say, upon the nature and extent of the dedication. As between the municipality and the general public, the legislative power is supreme. And so it is in all cases where there are no private rights involved. If the municipal corporation holds the full title to the ground for public uses, without restriction, the legislature may doubtless direct and regulate the purposes for which the public may use it.¹ But if a grant be made by a proprietor of a town

v. Taylor, 38 Mo. 815; *Price v. Thompson*, 48 Mo. 863; *Alton v. Transportation Company*, 12 Ill. 60; *San Antonio v. Lewis* (plaza or commons), 15 Texas, 388, 1855; 7 *Id.* 288; *New Orleans v. United States*, 10 Pet. 734; *Warren v. Lyons City*, 22 Iowa, 351, 1867; *Ransom v. Boal*, 29 Iowa, 68, 1870; *Branham v. San Jose*, 24 Cal. 585, 1864; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 1871. And see the learned and valuable opinion of *Baldwin, J.*, in *Hart v. Burnett*, 15 Cal. 580, as to the power of the Spanish municipal authorities over the lands of the pueblo.

A city council *cannot sell a public square* without authority from the legislature, even though the corporation holds it "for such public uses as the council may, from time to time, direct and ordain," and the object of selling is to apply the proceeds to the public use of paying the debts of the corporation incurred for public purposes. *Commonwealth v. Rush*, 14 Pa. St. 186, 1850; *Commonwealth v. Alburger*, 1 Whart. 469, *per Sergeant, J.*

Dedication on plat of two lots "for *school purposes*, and on which to erect school houses," is a dedication to a specific use, and the property is inalienable by the incorporated place in which it lies, so as to extinguish the use. And there is no power of alienation without the consent of the dedicator or his representatives, even though the lots, by reason of a railroad and depot near by, have been rendered unsuitable for school houses, and their use for that purpose dangerous. *Board v. Edson*, 18 Ohio St. 221, 1868.

Where lots are granted to *county commissioners* and their successors, in trust for the use of the said county in *fee simple* for the purpose of erecting thereon county buildings, which were erected, the land, on the subsequent removal of the seat of justice and the discontinuance of the original uses, does not revert to the original grantor or his heirs. *Seebolt v. Shitler*, 34 Pa. St. 133, 1859.

"*Market space*," on plat, makes it public, and when exchanged by legislative authority for other property for a "market space," that other, though deeded to the city in fee simple, is held by the city in trust, and cannot be sold on execution in payment of corporate debts. *President, &c. v. Indianapolis*, 12 Ind. 620.

¹ The streets and public squares of the city of Washington were conveyed by the original proprietors of the lands to trustees, "for the use of the

in laying it out for a specific and limited purpose, as, for example, a public square, the municipality or public acquiring only an easement, it has been decided by the Supreme Court of Iowa that the grantor in such a case retains an interest therein of such a nature that it is not, as against him, within the power of the legislature to authorize its sale by the municipality.¹

United States forever." It was held that these words conveyed an absolute, unconditional fee simple, and that the original proprietors had, as such, no interest therein, and could not, therefore, object to a sale authorized by an act of Congress, of such portions thereof as were no longer useful for streets and squares. *Van Ness v. Washington*, 4 Pet. (U. S.) 232, 1830. Legislature may authorize sale of lands of which the title is invested in a municipality in fee, acquired for a park. *Brooklyn Park Commissioners v. Armstrong*, 3 Lans. (N. Y.) 429, 1871; S. C., 45 N. Y. 234, 1871; *ante*, sec. 448, note.

¹ *Warren v. Lyons City*, 22 Iowa, 351, 1837. When the absolute title is acquired by condemnation for public use, the legislature may authorize the sale in cases where the rights of creditors or the obligation of contracts are not thereby impaired. *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 1871. *Ante*, sec. 463.

In the *County Commissioners v. Lathrop*, 1872, not yet reported, the Supreme Court of Kansas holds that the legislature so far represents the public that its consent to the alienation of public grounds dedicated under the statute is sufficient if no private rights have intervened. But that individuals purchasing from the town proprietors lots fronting on such public grounds, subsequent to their dedication, and making lasting and valuable improvements thereon, when lots are enhanced in value by their position, and would be made of less value by a change of such grounds from public to private uses have a vested interest in the trust which the legislature cannot destroy. See chap. XVIII. on Streets, *post*.

Where the public have only an easement, the legislature cannot pass a law vesting so much of a street as may be closed or discontinued in the corporation of a city, as this deprives the owner of his property without due process of law. *John and Cherry Streets*, 19 Wend. 659. In Connecticut, the public have simply an easement in highways, with the right to use materials thereon, in a reasonable manner, to make or repair them; the adjoining land owner retains the fee and the exclusive right to herbage growing thereon, and the public cannot put their cattle in the highway to graze; and it is expressly held that under such circumstances the legislature cannot, without providing compensation, authorize towns to pass by-laws giving liberty to the inhabitants to depasture their cattle in the public highways. *Woodruff v. Neal*, 28 Conn. 168, 1859. As to extent of legislative power, see *ante*, chap. IV. *Post*, chapter on Streets. *Ante*, sec. 496.

§ 514. By the *civil law* the public have, in land dedicated to public use, the right to the ground itself.¹ But such lands form no part of the public domain or crown lands, and the king or sovereign cannot alien them otherwise than by exercise of the right of eminent domain, although he may authorize certain exertions thereon.² And the doctrine has been declared by the Supreme Court of Louisiana, that where *public places* have been destined or created by the sovereign power, or with its consent, this power may authorize the municipal corporation interested in such places to alien or to change their use or destination whenever the public interest requires it, and that the rights of the owners of property in the vicinity are subordinate to this paramount right of the legislature.³

¹ *Renthrop v. Bourg*, 4 Martin (La.) 97; *Doe v. Jones*, 11 Ala. 63, 83.

² *New Orleans v. United States*, 10 Pet. 661, 725, 735, where *McLean, J.*, examines very fully the laws of France and Spain in respect to dedications to public use. 3 Kent Com. 451, and note.

³ *Mayor, &c. v. Hopkins*, 12 La. 326; *Mayor, &c. v. Leverich*, *Id.* 332; *Delabigarre v. Municipality*, 3 La. An. 230. It was decided, both by the state court (*Mayor, &c. v. Hopkins*, *supra*, and see *De Armas v. Mayor, et. al.*, 5 La. 132) and by the Supreme Court of the United States, that the public space, or *quay*, in front of Old Levee street and the river, in the city of New Orleans, was public property, *hors de commerce* (*New Orleans v. United States*, 10 Pet. 662), and did not pass to the United States under the treaty of cession of the province of Louisiana. Pending the controversy between the United States and the city of New Orleans as to the ownership of this property, the parties litigant agreed that it should be laid out into lots and sold, and the proceeds be held subject to the final decision of the court. After judgment was rendered in favor of the City of New Orleans, the legislature of Louisiana passed an act sanctioning the sale of this public property, and the question arose whether the legislature had this power. The Supreme Court of Louisiana held that the legislature possessed this right, laying down the principle that the sovereign power of the state had the right to change the destination of public places whenever it deemed the interest of the public required it, and that the right of the adjacent lot proprietors was necessarily subordinate to the paramount power of the legislature. *Mayor, &c. v. Hopkins*, 13 La. 326; *Same v. Leverich*, *Id.* 332.

Upon this subject of the power of a municipal corporation to *alien public places* with the consent of the sovereign power of the state, see opinion of *McLean, J.*, in *New Orleans v. United States*, 10 Pet. 662, 720. See, also, *Hebert v. De Valle*, 27 Ill. 448; *Bell v. Railroad Company*, 25 Pa. St. 161; *S. C.*, dissent of *Black, C. J.*, 1 Grant Cas. 105, 1854; *Warren v. Lyons City*, 22 Iowa, 351, 1867; *Philadelphia, &c. v. Railroad Company*, 6 Whart. 26.

Reverter.—Misuser.—Remedy.

§ 515. Property dedicated to public use, or to a particular use, does not revert to the original owner except where the execution of the use becomes impossible. If the dedicated property be appropriated to an unauthorized use, equity will cause the trust to be observed or the obstructions removed.¹

County Commissioners *v.* Lathrop, MSS. Supreme Court, Kansas, 1872; Hart *v.* Burnett, 15 Cal. 580; Payne *v.* Treadwell, 16 Cal. 222; distinguished by Field, C. J., in Grogan *v.* San Francisco, 18 Cal. 590, 614.

Legislature may authorize sale of "commons." Woodson *v.* Skinner, 22 Mo. 13, 1855; Carondelet *v.* McPherson, 20 Mo. 192; Swartz *v.* Page, 18 Mo. 610; Les Bois *v.* Bramell, 4 How. (U. S.) 449, 458. See *ante*, chap. IV., as to extent of legislative power over corporations and their property. The boundaries of the power, if indeed it has any limits, are not easily defined. See, also, chapter on Corporate Property, *ante*; *post*, chapter on Streets.

¹ *Per McLean, J.*, Barclay *v.* Howell's Lessee, 6 Pet. 498, 507, 1832; Williams *v.* The Church, 1 Ohio St. 478, 1853; Webb *v.* Moler, 8 Ohio, 552; Price *v.* Thompson, 48 Mo. 363; Warren *v.* Lyons City, 22 Iowa, 351, 1867, *per Wright, J.*; Price *v.* M. E. Church, 4 Ohio, 514; Brown *v.* Manning, 6 Ohio, 298; Le Clerq *v.* Gallipolis, 7 Ohio, pt. 1, 217; Board *v.* Edson, 18 Ohio St. 221, 1868; Harris *v.* Elliott, 10 Pet. 25; County *v.* Newport, 12 B. Mon. 538; Augusta *v.* Perkins, 8 B. Mon. 207. *Post*, sec. 534, *et seq.*

Chancery will protect the rights of the public in all public places, and will restrain an illegal alienation by the municipal corporation or by others, and, if necessary, will order a reconveyance. Attorney General *v.* Goodrich, 5 Grant (Can.) Rep. 402; Town of Guelph *v.* Canada Company, 4 Ib. 654.

Conveyance to municipality on condition that the property be used for a specific purpose. French *v.* Quincy, 3 Allen, 9. As to remedy, see chapter on Streets, *post*.

CHAPTER XVIII.

STREETS.

§ 516. Municipal corporations in this country sustain most important relations to *streets and highways within their limits*. By statute or charter they are usually authorized to open, establish, alter, and vacate streets. Land may be dedicated for streets and ways, as we have elsewhere shown. The authorities of these corporations are usually invested with the capacity to acquire property for streets for the public use and convenience, by the exercise of the power of eminent domain. Streets, when dedicated and accepted by the corporation, or acquired by purchase or otherwise, are usually placed under the control of the corporation with power to improve, grade, pave, regulate, &c. In some of the states there are statutes providing that the fee in the streets shall be in the municipality in trust for the public, while in other states the fee is considered to be in the adjoining proprietor, and an easement only in the public. The right of municipalities to acquire public streets by dedication,¹ and the power to condemn private property for this purpose by the exercise of the delegated right of eminent domain, have been elsewhere considered,² and the liability of municipal corporations in respect to defects and want of repair of the public streets within their limits, will be reserved for treatment in another place.³

§ 517. The subject of *Streets* will be considered in this place under the following heads:—

1. *Legislative control over Streets, and their Uses*; and herein of *obstructions* and *the remedy* of the public *by indictment and in equity*; the *remedy of the adjoining proprietors and others*, including the municipal corpora-

¹ *Ante*, chap. XVII. sec. 489, *et seq.*

² *Ante*, chap. XVI. sec. 452, *et seq.* *Post*, sec. 538.

³ *Post*, chap. XXIII., on Actions.

tion ; and *the effect of adverse possession*, and the operation of *statutes of limitation*—secs. 518–533.

2. The Establishment and Control of *Ordinary Roads* and Ways within Corporate Limits—secs. 534–537.

3. *Delegated Power of Municipal Corporations over Streets, and their Uses* ; and herein of the power to *grade and improve streets* ; and to authorize them to be used for other purposes than mere travel, such as *public sewers and cisterns*, for *gas and water pipes*, *telegraph poles*, for common *railroads* and *horse railways* ; also, their powers and duties as to *bridges* within their limits—secs. 538–580.

4. *Limitations on the Right to Free Transit and Use of Streets*—secs. 581–585.

Legislative Control over Streets, and their Uses—Its Extent—Legalization of Obstructions.

§ 518. Public streets, squares, and commons, unless there be some special restriction when dedicated or acquired, are for the *public use*, and the use is none the less for the *public at large*, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision and control of them to the local authorities. The legislature of the state represents the public at large, and has full and paramount authority over all public ways and public places. “To the commonwealth here,” says Chief Justice *Gibson*, “as to the king in England, belongs the franchise of every highway as a trustee for the public ; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads, laid out by the authority of the quarter sessions.”¹

¹ *Per Gibson*, C. J., *O'Connor v. Pittsburg*, 18 Pa. St. 187, 189, 1851. See, further, as to legislative power over public streets and their uses, *Trenton Railroad Case*, 6 Whart. 25 ; *Commissioners v. Gas Company*, 12 Pa. St. 318 ; *Stuber's Road*, 28 Pa. St. 199 ; *Stormfeltz v. Turnpike Company*, 13 Pa. St. 555, 1860 ; *Baird v. Rice*, 63 Pa. St. 489, 1871 ; *Gray v. Iowa Land Company*, 26 Iowa, 387, 1868 ; distinguished from *Warren v. Lyons City*, 22 Iowa, 351 ; *Railroad Company Brownell*, 24 N. Y. 345, 1862 ; *Reading v. Commonwealth*, 11 Pa. St. 196 ; *Woodruff v. Neal*, 28 Conn. 168, 1859 ;

§ 519. By virtue of its authority over public ways, the legislature may authorize acts to be done upon them or legalize obstructions therein, which would otherwise be deemed nuisances. As familiar instances of this, may be mentioned the authority to railway, water, telegraph, and gas companies, to use or occupy streets and highways for their respective purposes. And it may be here observed, that whatever the legislature may authorize to be done is of course lawful, and of such acts, done pursuant to the authority given, it cannot be predicated that they are nuisances; if they were such without, they cease to be nuisances when having the sanction of, a valid statute.¹ As respects the public or municipalities, there is no limit upon the power of the legislature as to the uses to which streets may be devoted. What limitations exist upon the power as respects the original proprietor of property dedicated to the public use, or the adjoining owner or others, is a subject which is elsewhere considered. Statutes legitimating acts and obstructions upon the highways which would otherwise be nuisances are strictly construed, and must be closely pursued, and the authority given must be exercised with proper care.² The legislature, instead of exercising this authority directly, may authorize it to be exercised by local or municipal authorities.³ An act of the

Jones River Co. v. Anderson, 12 Leigh (Va.) 276; Woodson v. Skinner (sale of commons), 22 Mo. 13, 1855; Bailey v. Railroad Company, 4 Harring. (Del.) 389, 1846; Mercer v. Railroad Company, 36 Pa. St. 99, 1859; Clinton v. Railroad Company, 24 Iowa, 455; Railroad Company v. Leavenworth, 1 Dillon C. C. R. 393, 1871; Litchfield v. Vernon, 41 N. Y. 123, 1869; Metropolitan Board of Health v. Heiser, 87 N. Y. 661, 672; Railroad Company v. Philadelphia, 47 Pa. St. 314; *Id.* 329.

¹ Same authorities. Angell on Highways, sec. 237; Baptist Church v. Railroad Company, 6 Barb. 213; Clinton v. Railroad Company, 24 Iowa, 455.

² Angell on Highways, sec. 287; Hughes v. Railroad Company, 2 Rh. Is. 493; Turnpike Company v. Railroad Company, 2 Harr. (N. J.) 314. In virtue of its authority over highways and over streets, which are, in effect, highways, the legislature may establish a *turnpike gate in the streets* of a city. But as such a privilege would embarrass public trade and convenience, the intention of the legislature must be plainly expressed. Stormfeltz v. Turnpike Company, 18 Pa. St. 555, 1850.

³ *Infra*, secs. 538-578; Sinton v. Ashbury, 41 Cal. 525, 1871.

legislature legalizing, for the time being, encroachments on the public streets, may be repealed at pleasure—being a mere revocable license—unless something was done or suffered in consideration of the act so as to invest it with the qualities of a contract.¹

§ 520. *Obstruction—Remedy of Public by Indictment and in Equity.*—The principle that streets and public places belong to the general, rather than the local, public, is one of great importance, and has been sometimes overlooked by the courts. Because they are public, whether the technical fee be in the adjoining owner, in the original proprietor, or in the municipality in trust for the public use, any unauthorized obstruction of the public enjoyment is an indictable nuisance.² And the proper officer of the common-

¹ Reading v. Commonwealth, 11 Pa. St. 196, 1849; Detroit v. Plank Road Company, 12 Mich. 333.

² State v. Atkinson, 24 Vt. 448, 1852; State v. Wilkinson, 2 Vt. 480; Commonwealth v. Rush, 14 Pa. St. 186, 1850; Heckerman v. Hummel, 10 Pa. St. 64, 1852; Mayor v. Gravier, 5 Mart. (La.) N. S. 662; Herbert v. Benson, 2 La. An. 770, 1847; Reading v. Commonwealth, 1 Jones (Pa.) 190; Runyon v. Bordine, 2 Green (N. J.) 472, 1834; Smith v. State, 3 Zab. (N. J.) 712; S. C., *Id.* 130, 1852; Davis v. Bangor, 42 Maine, 522; State v. Cincinnati Gas Company, 18 Ohio St. 268, 1868; People v. Jackson, 7 Mich. 432; People v. Carpenter, 2 Doug. (Mich.) 378; Attorney General v. Heishon, 18 N. J. Eq. 410, 1867.

A railroad company is indictable for a nuisance, if, without authority, it erects and continues a building in a public highway or street. State v. Railroad Company, 3 Zab. (N. J.) 360, 1852; Millhau v. Sharp, 27 N. Y. 611, 625. Where a private person takes possession of a public common or square, or encloses it, or otherwise wholly excludes the public, such act is *ipso facto* a nuisance, and the court should so charge the jury as a matter of law. And it is no defence that the public inconvenience was more than counterbalanced by the public benefit. State v. Woodward (indictment for inclosing public common), 23 Vt. 92, 1850; State v. Atkinson, 24 *Id.* 448. Rex v. Ward, 31 Eng. Com. Law, 180; 4 Ad. & El. 384, settled and put at rest this principle in England. A public common may, in such case, be described as a public highway. 2 Chitty Crim. Law, 389; State v. Atkinson, 24 Vt. 448.

Where a defendant is indicted and convicted for erecting a building which encroaches upon a public street, the proper judgment is that the nuisance be abated, and that the defendant pay a fine. Smith v. State, 3 Zab. (N. J.) 712, 1852. "This judgment," said the learned reporter, who was one of the counsel in this case, "is according to the old and well settled

wealth may proceed, in the name of the public, by bill in equity, for an injunction or relief, or by other appropriate action or proceedings, to vindicate the rights of the public against encroachment or denial by individuals.¹ So where, by its charter or constituent act, a municipality has the usual control and supervision of the streets and public places, it may, in its corporate name, institute judicial proceedings to prevent or remove obstructions thereon.²

§ 521. *Obstructions—Liability of Author of Obstruction—Remedy.*—The king cannot license the erection or commission of a nuisance;³ nor in this country can a municipal corporation do so by virtue of any implied or general powers. A building, or other structure of a like nature,

authorities (*citing them*). The form of entry, framed from *Rastell's Entries*, 441, was as follows: 'Therefore, it is considered, that the nuisance aforesaid be wholly removed and abated, and that the walls, erections, and buildings above mentioned, be taken away and removed, and that the aforesaid common and public highway be opened to its right and lawful width, as it was until the erection of said nuisance, at the proper costs and expenses of the said defendant; and that he do pay a fine of five dollars, &c.'" *State v. Railroad Company*, 3 Zab. 360.

¹ *People v. Vanderbilt*, 26 N. Y. 287; *Same v. Same*, 28 *Id.* 396; *State v. Mobile*, 5 Port. (Ala.) 279, 1837; *Moyamensing Com. v. Long*, 1 Par. (Pa.) 145; *Pittsburg v. Scott*, 1 Barr (Pa.) 309; *Commonwealth v. Rush*, 14 Pa. St. 186, 1850; *Heckerman v. Hummel*, 19 *Id.* 64, 1852; *Columbus v. Jacques*, 30 Geo. 506. If fact of encroachment is disputed and doubtful, it should be settled at law; if the bill be retained, an issue may be directed to try the fact. *Attorney General v. Heishon*, 18 N. J. Eq. 410, 1867.

² *Pittsburg v. Scott*, 1 Barr (Pa.) 309; *Mankato v. Willard*, 13 Minn. 18; *Winona v. Huff*, 11 Minn. 119; *Dummer v. Jersey City*, 1 Spencer (N. J.) 86, 1843; *Herbert v. Benson*, 2 La. An. 770; *Barclay v. Howell's Lessee*, 6 Pet. 507; *Watertown v. Cowen*, 4 Paige, 510; *Dubuque v. Maloney*, 9 Iowa, 450, 460, *per Stockton, J., arguendo*.

Right of corporation to file bill to restrain execution sale of lots and squares dedicated to educational, religious, and public uses, affirmed by a majority of the court in *Cox v. Griffin*, 18 Geo. 728, 1855. See *M. E. Church v. Hoboken*, 33 N. J. Law, 13, 1868. It has been held in Louisiana that a municipal corporation, without the institution of any judicial proceedings, may pull down and remove houses and obstructions in the public streets, and is not liable to the owner therefor. *Dublin v. Mayor, &c.*, 1 Martin (La.) O. S. 184; N. S. 100. And see *Herbert v. Benson*, 2 La. An. 770, 1847.

³ *Viner Abr. Nuisance, F.*

erected upon a street without the sanction of the legislature, is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets without express power to this end conferred upon them by charter or statute.¹ The usual power to regulate and con-

¹ *Flemingsburg v. Wilson*, 1 Bush (Ky.) 203; *Attorney General v. Heishon*, 18 N. J. Eq. 410, 1867; *Stetson v. Faxon*, 19 Pick. 147, 1837; *Commonwealth v. Rush*, 14 Pa. St. 186, 1850; *State v. Railroad Company*, 3 Zabr. 860, 1852; *Columbus v. Jacques*, 30 Geo. 506; *State v. Mobile*, 5 Port. (Ala.) 279; *State v. Laverack*, 34 N. J. Law, 201. *Ante*, sec. 316.

Any *continuous obstruction* of a public highway or street, *not authorized* by competent legal authority, is a public nuisance. *Per Denio*, C. J., in *Davis v. Mayor, &c. of New York*, 506, 1856—the horse railway case relating to Broadway.

The erection of a *market house* in the center of a public street, rendering, as it does, the highway less commodious, is a nuisance, which may be prevented by a bill in equity. *State v. Mobile*, 5 Port. (Ala.) 279, 1837; *S. P. Columbus v. Jacques*, 30 Geo. 506, 1860; *Ketchum v. Buffalo*, 14 N. Y. 374, *per Wright*, J. *Ante*, sec. 316; *post*, sec. 573, n.

A *purpresture* or permanent encroachment by the adjoining owner is in law, a nuisance, and the public have a remedy by indictment or in equity. *Smith v. State*, 3 Zabr. (N. J.) 712; *Ib.* 130; *Moyamensing Com. v. Long*, 1 Par. (Pa.) 145; *State v. Railroad Company*, 3 Zabr. 860; *Attorney General v. Heishon*, 18 N. J. Eq. 410.

Openings made and left in streets or sidewalks are nuisances. *Beatty v. Gilmore*, 16 Pa. St. 468; *Runyon v. Bordine*, 2 Green (N. J.) 472, 1834; *Scammon v. Chicago*, 25 Ill. 424. *Post*, secs. 793, 794. *Infra*, secs. 553, 554; *post*, chap. XXIII.

It is a public nuisance, and indictable at common law, to erect a stall for the public sale of articles on the street or pavement, without authority from the municipal corporation; the owner of the adjoining premises can confer no such authority. *Commonwealth v. Wentworth*, Bright. (Pa.) 818.

Respecting nuisances upon streets and highways, Mr. Justice Appleton says: "But nuisances may obviously be committed upon a highway by its unlawful use, for which those committing may be liable civilly to such as may suffer therefrom special damage, and be punished criminally, as thereby annoying the traveling public generally." Where the charter of a town gives it power to abate nuisances, the use of this term refers to the general law to determine what acts or things are such. In relation to streets and highways, "the carrying an unreasonable weight with an unusual number of horses (*Rex v. Egerly*, 3 Salk. 183); the driving a carriage through crowded streets with dangerous speed (*United States v. Hart*, Pet. [Circuit Court] 390); the selling by a constable, at auction, in the public thoroughfares (*Commonwealth v. Millman*, 18 Serg. & Rawle, 408); the placing at a window the effigy of a bishop, labelled, 'Spiritual Broker,' thereby drawing crowds to the shop (*Rex v. Carlisle*, 3 Carr. & P. 636); the keeping coaches

any use inconsistent with the purpose for which it was dedicated.¹

¹ *Le Clercq v. Gallipolis*, 7 Ohio, part 1, 218, 1835; approved, *Huber v. Gazley*, 18 Ohio, 18, 27, 1849; *Brown v. Manning*, 6 Ohio, 288, 305, 1834. These cases, distinguished from *Smith v. Hueston*, *Id.* 101, in which it was ruled that individual lot owners around a square conveyed to the county for "the use of public county buildings," including a court house, have not such special interest as will enable them to maintain a bill to enjoin the county authorities from leasing portions of the square to individuals, the court saying: "If the rights of the county are violated or threatened, redress must be sought in the name of the county or its acknowledged agents." See *Chapman v. Gordon*, 29 Geo. 250; *Indianapolis v. Croas*, 7 Ind. 9; *Haynes v. Thomas*, 7 Ind. 38; *Rowan v. Portland*, 8 B. Mon. 232; *Cook v. Burlington*, 30 Iowa, 94, 1870; *Rutherford v. Taylor*, 38 Mo. 315. Non-adjacent property owners upon square cannot complain of its being closed up by the municipal authorities. *Kettle v. Fremont*, 1 Neb. 329.

"It has been so often and uniformly held by the supreme court of Louisiana, that public places within the limits of a corporation cannot be appropriated to private use, and that individual corporators, as well as the officers of the corporation [and the corporation in its own name], have the right to prevent such appropriation and to sue for the demolition and removal of buildings erected on them by individuals, that the question can no longer be considered an open one." *Per Rost, J., Herbert v. Benson*, 2 La. An. 770, 1847. In this case the court sustained the action of the plaintiff seeking to abate as a nuisance a warehouse erected by the defendant on the bank of a river within the corporate limits and in front of the plaintiff's house. *Mayor, &c. v. Gravier*, 5 Mart. (La.) N. S. 662, also holds that any inhabitant has this right. It has been held that no one has a right to occupy the street in front of another's house to carry on a trade or business, and the adjoining owner may, if necessary, use force to remove one who so occupies the street; therefore, where a cabman refused to drive away his cab from in front of a hotel, and was removed by a policeman at the request of the owner of the hotel, the policeman was not guilty of an assault. *Vandersmith's Case*, 10 Pa. Law J. 523.

As to rights of *adjoining owner*: *Nelson v. Godfrey*, 12 Ill. 22, 23; *Indianapolis v. Croas*, 7 Ind. 9; *Id.* 38; *Milhau v. Sharp*, 27 N. Y. 611; *Cooper v. Alden*, Harring. Ch. (Mich.) 72; *Alden v. Pinney*, 12 Fla. 348; *Price v. Thompson*, 48 Mo. 368; *Parsons v. Trustees*, 44 Geo. 529.

In Kansas it is held, that the mere fact that private lots fronting upon public grounds are thereby increased in value, does not create a trust therein which the owners of such lots can enforce in equity. But that where the owners of lands dedicate a portion to public uses as parks, or otherwise, and after such dedication sell and convey lots in the remaining portion, fronting on such public grounds, to others, who erect lasting and valuable improvements thereon, a trust is created therein which may be enforced in equity by those lot owners. *County Commissioners v. Lathrop*, Supreme Court, Kansas, 1872. *Ante*, chap. XVII. on Dedication, sec. 506.

§ 523. *Obstruction—Remedy of Corporation—Ejectment.*—A municipal corporation entitled to the possession and control of streets and public places, may, in *its corporate name*, recover the same *in ejectment*. Where it possesses the fee, although in trust for public uses, there are no technical obstacles in the way of maintaining such an action against the adjoining proprietor or whoever may wrongfully intrude upon, occupy, or detain the property. But where the adjoining proprietor retains the fee, the courts have overcome the technical difficulty by regarding the right to the possession, use, and control of the property by the municipality as a legal, and not a mere equitable, right¹

§ 524. Where the *public acquire only the use*, and the fee remains in the original proprietor or abutter, the latter is considered the owner of the soil for all purposes not incon-

¹ *Dummer v. Jersey City* ("market ground"), 1 Spencer (N. J.) 86, 1848; *Winona v. Huff* ("public square"), 11 Minn. 119, 1866; *Klinkener v. School District*, 1 Jones (Pa.) 444; *Hannibal v. Draper* ("church ground"), 15 Mo. 634, 1852; *Commissioners v. Boyd* ("town commons"), 1 Ire. (Law) 194, 1840; *M. E. Church v. Hoboken* (ejectment by city for public "square"), 33 N. J. Law, 13, 1868. Where a corporation has the legal title to the soil of the commons or public streets, it may maintain ejectment to recover the possession thereof. *Savannah v. Steamboat Company*, R. M. Charl. (Geo.) 342, 1830. *Law, J.*, expressed, *arguendo*, the opinion, that where the public or corporation have an easement only, and not the fee, the remedy for a violation of the right is not by private action, but by public prosecution.

Remedy of corporation in equity, see *Detroit v. Railroad Company*, 28 Mich. 178. *Post*, sec. 559, note.

The municipal act of Upper Canada contains the provision that "every public road, street, bridge, or other highway, in an incorporated city or place, shall be vested in the municipality, subject to any rights in the soil reserved by the individuals who laid out the same." Sec. 838, Harrison's *Munic. Man.* p. 274, 2nd edition. This section is held not to convey to the municipality such a freehold and estate as to entitle it to maintain ejectment for a portion of a public highway. *Sarnia v. Railway Co.*, 21 Upper Can. Q. B. 59, 62. *Fitzgibbon v. Toronto*, 25 *Id.* 137. But *quære*? But it may, it seems, sue for wrongful injuries thereto. *Thurlow v. Bogart*, 15 Up. Can. Com. Pleas, 1; 14 *Id.* 299; S. C., 16 *Id.* 124. A municipal corporation may, it would seem, resort to equity in proper cases, to restrain an illegal interference by a railroad or other company with streets which are placed under municipal control. *Atty.-Genl. v. Nepean Road Co.*, 2 Grant (Canada) R. 626. *Post*, sec. 559, note.

sistent with the public rights, and may maintain actions accordingly. Thus it has been held that he may maintain ejectment against an individual who, without lawful authority, erects a private building upon a public square under a lease from the local authorities, these having no power to authorize such a use. The recovery is, of course, subject to the public easement. It does not fall within the plan of this work to treat at length of the rights of action of the original proprietor or adjoining owner, but they will be found discussed in the cases and authorities cited below. We remark only with respect to streets and public places in cities, that ejectment by the adjoining owner seems to be a singularly inapt remedy for an illegal use or occupation thereof.¹

¹ *Pomeroy v. Mills* (public square), 8 Vt. 279, 1830; *Bolling v. Petersburg*, 3 Rand. (Va.) 563, 1825; *Warwick v. Mayor*, 15 Gratt. (Va.) 528, 1860; *Woodruff v. Neal*, 28 Conn. 168; *Cooper v. Smith*, 9 Serg. & Rawle, 26; *Tillmes v. Marsh*, 67 Pa. St. 512, 1871; *Stites v. Curtis*, 4 Day, 328; *Peck v. Smith*, 1 Conn. 103; 2 Smith Lead. Cas. 184, 185; Angell on Highways, chap. VII.; *Bissell v. Railroad Company*, 23 N. Y. 61; *Sherman v. McKeon*, 88 N. Y. 266.

In Massachusetts, the adjacent proprietor *owns to the middle of the street*, subject to the public easement. *Boston v. Richardson*, 13 Allen, 152, 153; *White v. Godfrey*, 97 Mass. 472; *Bliss v. Ball*, 99 *Ib.* 597; *S. P. Bissell v. Railroad Company*, 23 N. Y. 61; *Railroad Company v. Elevator Company*, 50 Pa. St. 499. And may recover in trespass for destruction of shade trees in the street in front of his lot. *Bliss v. Ball*, 99 Mass. 597, 1868; *White v. Godfrey*, 97 Mass. 472. See *ante*, sec. 332.

In *Carpenter v. The Oswego, &c. Railroad Company*, 24 N. Y. 655, 1861, it was decided that *ejectment* would lie in favor of the owner of the fee in land subject to a public easement—for example, a street—against a party appropriating it to private occupation, such as the laying down therein, by a railroad company, of its track and rails. And it was thus held, notwithstanding it was argued that no judgment which the plaintiff could obtain would give him a right to the premises, as the public would still be entitled to use them as a street. *S. P. Wager v. Troy, &c. Railroad Company*, 25 N. Y. 526, 1862; *Sherman v. McKeon*, 88 N. Y. 266, 1868. In *Cincinnati v. White*, 6 Pet. 431, it was declared to be the opinion of the court, that where the dedication is complete, and the rights of the public have attached, the owner of the soil, though retaining the naked legal title, cannot recover in ejectment. The reason given for this ruling has much force. It is, that ejectment is a possessory action, and that whatever deprives the plaintiff of the right of possession will deprive him of the remedy by ejectment. Exclusive possession of the land cannot, it was said, consistently with the

§ 525. Where, however, the *fee or legal title* passes from the original proprietor, as in some of the States it is declared it shall, in statutory dedications, and in land acquired for streets and public purposes by the exercise of the right of eminent domain, such proprietor or the adjoining owner cannot maintain an action for injuries to the soil, or ejectment, but he still has his remedy for any special injury to his rights by the unauthorized acts of others.¹

§ 526. *Ejectment—Effect of Judgment or Decree Against Municipal Corporation.*—It fairly results from the view taken in this chapter of the nature of the rights of

rights of the public, be delivered to the plaintiff in execution of a judgment of recovery. The doctrine of Lord Mansfield, in *Goodtitle v. Alker*, 1 Burr. 143, "that *ejectment* will lie by the owner of the soil for land which is subject to a passage over it as the king's highway," was regarded by the court, or at least by the judge delivering the opinion, in *Cincinnati v. White*, 6 Pet. 431, 442, as unsound, although it was not denied that trespass would lie, as a recovery in damages would not be inconsistent with the public right. See American note to *Dovaston v. Payne*, 2 Smith Lead. Cases, 185, where this subject is discussed. *Redfield v. Railroad Company*, 25 Barb. 54; *Hunter v. Sandy Hill*, 6 Hill, 407. That *trespass* would lie in such a case is well established. *Wager v. Troy Railroad Company*, *supra*, and authorities cited in Mr. Justice *Sunderland's* opinion, p. 540. See, also, *Mahon v. New York, &c. Railroad Company*, 24 N. Y. 658; *Fletcher v. Auburn, &c. Railroad Company*, 25 Wend. 462, 1841; 21 Wis. 602; 23 N. Y. 61. *Ante*, sec. 562. *Post*, chap. XXII, sec. 727, *et seq.*

Though the party has a remedy at law for the trespass, yet as the trespass is of a continuing nature, he may go into equity, have an injunction to prevent a multiplicity of suits, and recover damages as incidental to this relief. *Williams v. New York Central Railroad Company*, 16 N. Y. 97, 111, 1857.

¹ *Canal Trustees v. Haven*, 11 Ill. 554; *Hunter v. Middleton*, 13 Ill. 50; *Moses v. Railroad Company*, 21 Ill. 522; *Protzman v. Railroad Company*, 9 Ind. 467; *Railroad Company v. O'Daily*, 13 Ind. 353; *People v. Kerr*, 27 N. Y. 168; *Shurmeier v. Railroad Company*, 10 Minn. 82; affirmed, 7 Wall. 272; *Cooley Const. Lim.* 556, and see note. The laying off and recording a town plat, or of an addition thereto under, has, under the statute of Iowa, the effect to vest in the corporation the fee simple title to, and exclusive right of, dominion over the streets and alleys thus dedicated to the public use. In such case neither the original proprietor nor his grantee has the right of the subterraneous *deposits of coal* within the limits of such streets, and the corporation may maintain an action against him for coal mined and taken by him from beneath the same. *Des Moines v. Hall*, 24 Iowa, 234, 1868.

the public at large in streets and public places, that a *judgment in ejectment* by the proprietor of land against a city corporation where the disputed question was as to the ownership of the soil, does not conclude or affect the right of the public to the easement of a street or public place, since the public is, in these respects, represented by the commonwealth, and such a judgment is *res inter alios acta* as to the public right.¹ In California, the court went even further in protection of the rights of the public, and decided not only that there was no power in the municipality to mortgage property held for the public use, but that a decree of foreclosure of such a mortgage does not estop the public or even the municipality, the decree and mortgage being equally null and ineffectual.²

§ 527. *Vacation of Streets*.—The plenary power of the legislature over streets and highways is such that it may, in the absence of special constitutional restriction, vacate or discontinue them, or invest municipal corporations with this authority.³ A municipal corporation, under the au-

¹ *Warwick v. Mayo, Mayor*, 15 Gratt. (Va.) 528, 1860; *Bolling v. Petersburg*, 3 Rand. (Va.) 568. On the ground, which is hardly tenable, that the municipal authorities, as respects public squares and streets, represent not only the corporation but also the public, Mr. Justice *Rost* was of opinion that a final judgment against a corporation was also a judgment against the public, and conclusive upon individuals. *Xiques v. Bujac*, 7 La. An. 498, 1852, *per Rost, J.* But in the same case, Mr. Justice *Preston* expressed the opinion, which is believed to be the correct one, that a judgment against the right of a city to public property will not bar an individual not a party to the suit, and who is interested in maintaining the dedication.

² *Branham v. San Jose*, 24 Cal. 585, 1864.

³ *Gray v. Iowa Land Company*, 26 Iowa, 387, 1868; *Kimball v. Kenosha*, 4 Wis. 321; *Stuber's Road*, 28 Pa. St. 199; *Commissioners v. Gas Company*, 12 Pa. St. 318; *Trenton Railroad Case*, 6 Whart. 25; *Jersey City v. State*, 1 Vroom (N. J.) 521; *Bailey v. Railroad Company*, 4 Harring. (Del.) 389, 1846; *Riggs v. Board of Education of Detroit*, Michigan Supreme Court, 1873, not yet reported; *Hinchman v. Detroit*, 9 Mich. 108; *People v. Supervisors*, 20 Mich. 95, 1870; *Baird v. Rice*, 63 Pa. St. 489, 1871, where an act authorizing the erection of municipal public buildings on a square originally dedicated for that purpose, and the vacation of so much of two public streets as might be necessary, was held constitutional. *Ante*, sec. 508. Says Mr. Justice *Campbell*, in *Riggs v. Board of Education of Detroit*, *supra*: "In *Hinchman v. Detroit*, *supra*, the power of the city to vacate a portion of the Campus Martius was sustained, and it was held this might be

thority conferred in its charter "to locate and establish streets and alleys, and *vacate* the same," may constitutionally order the vacation of a street; and this power, when exercised with due regard to individual rights, will not be restrained at the instance of a property owner claiming that he is interested in keeping open the streets dedicated to the public.¹

§ 528. *Prescription and Adverse Possession.—Statute of Limitations.*—Concerning rights and remedies with respect to streets and public places, an interesting topic remains on which the cases are not agreed, and that is, whether the rights of the municipality or of the public may be lost by non-user, or adverse possession. There may be instances where the non-user has continued so long, and private rights have grown up of such a nature as to amount to an *equitable estoppel*, or an estoppel *in pais*, on the public, which the courts will enforce upon principles of justice; but such cases are exceptional in their character, and it would perhaps be going too far to say that the courts have distinctly established such a principle.² The state of

done without determining in advance the future uses. And where private property is not taken the right by authority of legislation to surrender or extinguish public rights has never been questioned. 3 Smith's Leading Cases, 96; *People v. Supervisors of Ingham*, 20 Mich. 95." But in Indiana the principle was regarded as sound, that in addition to the public easement, and distinct from it, there exists in favor of the owner of a lot upon the street, and as appurtenant to it, a private right to use the street and to insist that the street shall forever be kept open to its full width. And the court considered the conclusion to follow from this principle, that the legislature cannot, without the consent of the lot owner, or compensating him for the damage, vacate a street, or any part of it, in front of or adjoining the lot. *Haynes v. Thomas*, 7 Ind. 38, 1855; *Indianapolis v. Cross*, *Id.* 9; *Tate v. Railroad Company*, *Id.* 470, 483. But as to this point, *quære*.

¹ *Gray v. Iowa Land Company*, 26 Iowa, 387, 1868; distinguished from *Warren v. Lyons*, 22 Iowa, 351. Upon the discontinuance of an easement in a public highway, the freehold, or soil, in general, reverts to the owner of the land. *Harris v. Elliott*, 10 Pet. (U. S.) 26, 1836. As to streets in town. *Barclay v. Howell's Lessee*, 6 Pet. 498, 513, *per McLean, J. Ante*, sec. 515.

² *Lane v. Kennedy*, 13 Ohio St. 42, 49, 1861, *per Peck, J.*; 3 Kent Com. 451, note, where Chancellor Kent, noticing the case of *New Orleans v. United States*, 10 Pet. 662, suggests that there may be such non-user by the

the law, aside from statutory enactment, can best be exhibited by referring to the leading adjudications.

§ 529. The doctrine is well understood, that to the sovereign power, the maxim, "*nullum tempus occurrit regi*," applies, and that the United States and the several States are not, without express words, bound by statutes of limitation.¹ Although municipal corporations are considered as public agencies, exercising, in behalf of the State, public duties, there are many cases which hold that such corporations are not exempt from the operation of limitation statutes, but that such statutes, at least as respects all real and personal actions, run in favor of and against these corporations in the same manner and to the same extent as against natural persons.²

public, and such adverse claims by the original owner, as may, in time, bar the public; "for in this country," he adds, "time may [by legislation] create a bar to the sovereign's right." *De Vaux v. Detroit*, Harring. Ch. (Mich.) 98.

¹ *United States v. Hoar*, 2 Mason C. C. R. 314; *Johnson v. Irwin*, 3 Serg. & Rawle (Pa.) 291; *Lessee v. Saunders*, 1 Bay (South Car.) 30; *People v. Gilbert*, 18 Johns. 227; *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 735; Angell on Limitations, 36. *Ante*, sec. 433, note.

² *Lessee, &c. of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298, 1838. In this case the question was most thoroughly argued and examined by able lawyers, and no cases precisely in point as to municipal corporations were produced. The doctrine of the text was distinctly decided, and was adhered to and applied in the more recent case of *Cincinnati v. Evans*, 5 Ohio St. 594, 1855. As a result of this doctrine, these cases hold that notorious and uninterrupted possession by a private individual or private corporation under a claim of right of land dedicated to a city for public squares or streets for the period of the statutes of limitations, will bar the city of the claim to its use. In *Lane v. Kennedy*, 18 Ohio St. 42, 1861, the prior cases in that state are noticed, and it was held that a partial encroachment, by a fence, of a surveyed highway, was not, necessarily, adverse to the public, nor inconsistent with the easement of the public, the court, by Peck, J., observing that the case was distinguishable from *Cincinnati v. Evans*, 5 Ohio St. 594, and the principle was adopted that where the circumstances surrounding the possession are entirely reconcilable with a continued recognition of the ultimate right of the public, the possession is not adverse. Referring to *Cincinnati v. Evans*, *supra*, in which there was an encroachment of a permanent character on the street, the learned judge just named observed: "That case was, in this view of it, rightly determined; but it might, with equal, if not greater, propriety, have been placed [not upon

§ 530. It will be seen, on examination, that quite a number of the cases cited in the last note declare that the public may even lose their right to streets and public places by long continued adverse occupation by private individuals. But on the other hand, it has been repeatedly held by the Supreme Court of Pennsylvania, "that the lapse of time furnishes no defence for an encroachment on a public right," such as an obstruction on a street or a public square. The view of the court is, in substance, this:

the statute of limitations, but] upon the ground of an *estoppel in pais*, on the part of the city authorities, the building having been located by the city surveyor upon the lines *previously established and built upon*." See *Jersey City v. State*, 1 Vroom (N. J.) 421, 1863; *Cross v. Morristown*, 18 N. J. Eq. 805, 1867; *Evans v. Erie County*, 66 Pa. St. 222. In the same state it has been still more recently decided, that the use, by a gas company, of the streets of a city for twenty years, does not bar an inquiry by the *State* into the rightfulness of the use. *State v. Cincinnati Gas Company*, 18 Ohio St. 268, 1868. See, also, *Philadelphia v. Railroad Company*, 58 Pa. St. 253. On the general subject of the application of the statute of limitations to municipal corporations, see, also, *Galveston v. Menard*, 23 Texas, 349, 408, 1859; *School Directors v. Goerges* (ejectment) 50 Mo. 194, 1872; *Abernathy v. Dennis*, 49 Mo. 468; *Baker v. Johnson*, 33 Iowa, 151, 1871; *Rowan's Executors v. Portland*, 8 B. Mon. 259; *Alves v. Henderson*, 16 B. Mon. 181, 171, 1855; *Dudley v. Frankfort*, 12 B. Mon. 610, 617; *Newport v. Taylor*, 16 B. Mon. 699, 806; *Paine v. Commissioners, &c.*, *Wright's Ohio Rep.* 417; *Kelly's Lessee v. Greenfield*, 2 Har. & McHen. (Md.) 132, 187; *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 137. And see Judge *Storer's* argument, 8 Ohio, 304; *St. Charles v. Powell*, 22 Mo. 525, 1856; *Armstrong v. Dalton*, 4 Dev. (North Car.) 568, 1834; *Pella v. Scholte*, 24 Iowa, 283; *Bowen v. Team*, 6 Rich. (South Car.) Law, 298; *Clemens v. Anderson* ("swamp-lands"), 46 Miss. 581, 1872; *State v. Pettis*, 7 Rich. 390; *Barnwell v. McGrath*, 1 McMullen (South Car.), 174; *County v. Brinthal*, 29 Pa. St. 38; *ante*, secs. 406, n., 412, n., 433, n.; *Magee v. Commonwealth*, 46 Pa. St. 358, where the statute of limitations was held not applicable to assessments for local improvements. But see *Evans v. Erie County*, 66 Pa. St. 222. The Missouri statute of limitations respecting a "liability created by statute" applies to an action by a city corporation to recover a special tax assessed against property for a street improvement; and as by express provision of the statute its limitations apply to actions brought in the name of the state or for its benefit, the statute, as it would clearly run against the state, runs equally, in the absence of special provision to the contrary, against the public and municipal corporations of the state. *St. Louis v. Newman*, 45 Mo. 138, 1869. The statute of limitations does not, in any event, begin to run against the inhabitants of a town until they are incorporated, and thus capacitated to sue. *Reilly v. Chouquette*, 18 Mo. 220, 1853.

Streets and public squares are dedicated or acquired for the *public use*, and not alone for that of the people of the city, the corporation being the mere trustee for the public; that erections by private persons, on property thus dedicated or acquired, cannot be authorized by the original proprietor, nor by the city corporation, and can be authorized only by act of the legislature; that unauthorized obstructions and erections thereon are public nuisances, and may be prosecuted by indictment or other proceedings, on behalf of the public, and that no length of time, unless there be a limit *by statute*, will legalize a public nuisance, or bar the right of the public to proceed by indictment to abate it, and that, in the absence of a grant shown from a competent source, no presumption from mere lapse of time can be made to support a nuisance which is an encroachment on the public right. In one case, Mr. Justice *Sergeant* well observes: "These principles pervade the laws of the most enlightened nations, as well as our own code, and are essential to the protection of public rights, which would be gradually frittered away if the want of complaint or prosecution gave the party a right. Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have an interest sufficient to make them vigilant. But in public rights of property, each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right."

¹ *Per Sergeant, J.*, Commonwealth *v.* Alburger, 1 Whart. (Pa.) 469, 488. See, also, Commonwealth *v.* McDonald (indictment for "actual obstruction," etc.), 16 Serg. & Rawle, 390, 1827; Barter *v.* Commonwealth (ownership of wells in streets), 3 Pa. (Penrose & Watts) 253, 1881. In this case, *Gibson*, C. J., remarks: "The title of the corporation [of Lancaster] to the soil [of the streets] for uses that conduce to the public enjoyment and convenience, is paramount and exclusive; and no *private* occupancy, for whatever time, and whether adverse or by permission, can vest a title inconsistent with it. The case of the Commonwealth *v.* McDonald, by which this salutary principle has been conclusively established, is founded in the purest reason, and fortified by the strongest authorities." *Ib.* 259; Ring *v.* Schoenberger (claim of ownership in public square), 2 Watts (Pa.) 23, 1833. As to title by adverse possession, compare with remarks of *Gibson*, C. J., above quoted: Commonwealth *v.* Alburger (indictment for erecting church in Franklin Square, Philadelphia), 1 Whart. (Pa.) 469, 1836; Penny Pot Landing Case, 16 Pa. St. 79, 94, citing and re-affirming the foregoing cases;

§ 531. In Louisiana, also, it is considered, that streets, levees, commons, or public grounds, &c., are lands which are *out of commerce*, incapable of being alienated, and must ever remain free to the public. It is, therefore, held, that no silence or length of time can deprive a public corporation of its power over public places; that its inaction may give an occupier an estate at sufferance, but nothing more; and that inasmuch as such property is not susceptible of alienation by the corporation, no prescriptive adverse right thereto can be acquired, since prescription presupposes a title fairly acquired, but not now capable of proof.¹

Philadelphia v. Railroad Company, 58 Pa. St. 253. It is a fair deduction from the foregoing cases, that a prescriptive right to maintain an encroachment upon the public streets or squares cannot be set up as against the public, and that, as against the public, a title by adverse possession cannot be acquired by individuals. As to private rights, the statute of limitations runs, in Pennsylvania, against municipal corporations. *Evans v. Erie County*, 66 Pa. St. 222. This case holds that as respects real property owned by a municipal corporation, the statute of limitation applies the same as against other owners of private property.

The doctrine that a right to a portion of a public street may be acquired as against the public by prescription or adverse possession, was rejected, and characterized "eminently disastrous to the public interests," by *Whelpley, J.*, in *Jersey City v. Morris Canal Company*, 1 Beasl. (N. J.) 547, 561, denying the correctness of *Knight v. Heaton*, 22 Vt. 480, and similar cases, which hold that the enclosure and occupation of land within the limits of a highway for twenty years under a claim of right, makes title in the occupier by prescription as against the public. *Smith v. State*, 3 Zab. (N. J.) 712, 1852. It was held in *Simmons v. Cornell*, 1 Rh. Is. 519, that no adverse possession and use of a *portion* of a highway by individuals, however long, would give a title as against the state or the public, as the statute of limitation does not run against them, because the adverse claim could never have had a legal commencement. But see *Beardslee v. French*, 7 Conn. 125, where an entire *non-user* for ninety years of the whole way, and an exclusive possession by an individual, was held to extinguish the right of the public. *Litchfield v. Wilmot*, 2 Root, 288. A street was dedicated eighty feet in width, and subsequently, under proceedings void in law, twenty feet were vacated, leaving the street sixty feet wide, to which width only did the municipal authorities work it, and adjacent lot owners improved with reference to its being a sixty feet street. It was the opinion of the chief justice that the city, acting under the mistake of supposing the proceedings to vacate to be binding upon it, was not thereby estopped to insist that the street was eighty feet wide. *Jersey City v. State*, 1 Vroom (N. J.) 521, 1863; *Cross v. Morristown*, 18 N. J. Eq. 305, 1867.

¹ *New Orleans v. Magnon*, 4 Martin (La.) 2, 1815; *S. P. Mayor, &c.*

§ 532. In Illinois, where the statute of limitations protects an actual possession of lands, under a *bona fide* claim or color of title, for seven years, to the extent and according to the purport of the possessor's paper title, it is held that this statute does not apply to a suit brought by a municipal corporation to recover possession of property which was dedicated to it for the use of the public, since the corporation has no power to *alien* or *dispose* of the property, and hence there could be no paper title to be protected such as the statute contemplated. Whether an adverse possession for twenty years would defeat an action by the corporation, no opinion was given.¹

§ 533. Upon consideration, it will, perhaps, appear that the following view is correct: Municipal corporations, as we have seen, have, in some respects, a double character—one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the

v. Maggioli, 4 La. An. 73, 1849; *Ingram v. Police Jury*, 20 La. An. 226, 1868. It may be observed that in neither of these cases did the defendants show a state of facts of which adverse possession could be fairly predicated, or a right or title fairly acquired. See, also, *Delabigarre v. Second Municipality*, 8 La. An. 230, 237; *Shreveport v. Walpole*, 22 La. An. 526, 1870. Acts of city authorities, in ignorance of its rights and prejudicial to those rights with respect to streets and commons, are not binding upon the corporation. *Lewis v. San Antonio* (Exidos grant for pasturage, &c.), 7 Texas, 288, 1851; *New Orleans v. United States*, 10 Pet. 784.

As to title against the public, or a municipal corporation, by *adverse possession*, see, further, 1 Domat, 492; *Henshaw v. Hunting*, 1 Gray (Mass.) 203; *Jersey City v. Morris Canal Company*, 1 Beasl. (N. J.) 547; *Fox v. Hart*, 11 Ohio, 414; *Rowan's Executors v. Portland*, 8 B. Mon. 282, 259; *Commissioners v. Taylor*, 2 Bay (South Car.) 282; *Galveston v. Menard*, 28 Texas, 349; *Onstott v. Murray*, 22 Iowa, 457; *McFarlane v. Kerr*, 10 Bosw. (N. Y.) 249; *Litchfield v. Wilmot*, 2 Root (Conn.) 288; *State v. Pettis*, 7 Rich. (South Car.) Law, 390; *Memphis v. Lenore*, 6 Coldw. (Tenn.) 412; *Bowen v. Team*, 6 Rich. 298; *Pella v. Scholte*, 24 Iowa, 283.

¹ *Alton v. Illinois Transportation Company*, 12 Ill. 60; *Turney v. Chamberlain* (as to adverse possession), 15 Ill. 271.

statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no laches on its part or on that of its officers can defeat the right of the public thereto, yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will, perhaps, be found, that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine, that as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to such cases, as this leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require.

The Establishment and Control of Ordinary Highways and Roads Within Municipal Limits.

§ 534. Throughout the United States, township, county, or other local authorities, have the general control and supervision over the ordinary public highways, while in incorporated towns and cities this power, as respects streets, is usually conferred upon the corporate authorities. When the jurisdiction and power in the one is excluded by the charters of the other, has given rise to nice and difficult questions of construction, depending upon the supposed intention of the legislature to be gathered from the whole course of legislation on the subject in the particular state, and with reference to the particular municipality. A few illustrations, drawn from actual decisions, may be useful; and first, of cases where it has been held that the municipal authority was exclusive of the authority conferred upon other officers or tribunals by the general statutes.

§ 535. In Tennessee it was held, in an early case, that the County Court had no power to lay off roads through incorporated towns: Because, 1. The act of assembly au-

thorizing them to lay off such *roads* within a county as they shall deem proper, does not literally extend to *streets*.

2. Every town supposes lots and streets, and its erection into a town by the legislature creates a state of private interest distinct from the body of the county, and this should be regulated by the town's-people. 3. The magistrates composing the County Court are from the country, at least most of them, and consequently cannot be expected to know the interest of the corporation, and if they did they might feel inimical to it.¹ So, by statute in Texas, the counties had general authority to keep in repair the public highways therein, and an incorporated town, by its charter, had the right to improve its streets and alleys; and the question arose, whether the county or town authorities had power to keep in repair streets or highways within the corporate limits of the town. The court, to prevent conflict of jurisdiction, held that the town had exclusive control of the streets and highways therein.² So it is held, in Indiana, that the general statutes of the state in relation to "public highways," do not apply to the *streets* and *alleys* of an incorporated town or city.³

§ 536. On the principle of the foregoing cases, it is held that a general state law, authorizing counties and townships

¹ Cowan's Case, 1 Overton (Tenn.) 811, 1808. "A highway is not a street, either technically or in common parlance; so judicially settled." *Indianapolis v. Croas*, 7 Ind. 9; *Lafayette v. Jenners*, 10 *Id.* 74, 79. But a street is of course a highway, in the sense that it is free for every person to use it for the purpose of travel, conforming, of course, to all proper police regulations, and the right of passage is one which the municipal authorities cannot abridge or deny. *Bell v. Foutch*, 21 Iowa, 119, 131, 1866; *Barret v. Brooks*, *Id.* 144.

It is held in New York that footmen and vehicles have each the right of passage in common and neither any superior right of way; each is bound to use due care to avoid being injured and to avoid doing injury. *Baker v. Savage*, 45 N. Y. 191, 1871. *Post*, sec. 788, note.

Duty of traveller upon street crossing where vehicles are numerous, considered. *Id.*

² *State v. Jones*, 18 Texas, 874, 1857.

³ *Indianapolis v. Croas*, 7 Ind. 9, 1855. So, in New Jersey, it is held, that the general road acts of the state do not apply to incorporated places having special power to regulate and improve streets. *Cross v. Morristown*, 18 N. J. Eq. 305; *State v. Morristown*, 33 N. J. Law, 57.

to impose the burden of road labor only on persons between twenty-one and fifty years of age, does not limit the express charter power of a city to impose such burden upon all persons over twenty-one years of age, and hence it may require persons over fifty years of age to perform road labor.¹

§ 537. On the other hand, power, by charter, conferred upon a city to lay out new highways, and to alter, enlarge, and extend highways within its limits, was held not to divest, by implication or implied repeal, the jurisdiction of the County Court over the same subject given by general statutes.² So it is held, in Ohio, that general powers being conferred upon the commissioners of the county to lay out and establish roads within the limits of the county, they are thereby authorized, unless their authority is especially

¹ Fox v. Rockford, 88 Ill. 451, 1865. See O'Kane v. Treat, 25 Ill. 557, as to exemption of cities under charters from road taxes levied by township and county authorities. In general, the jurisdiction of a city or town over its streets is exclusive, as to road labor, of the general laws of the state relating to public or county roads. *Ib.* Ottawa v. Walker, 21 Ill. 605.

Road labor may be constitutionally imposed by statute unless the power of the legislature be specially limited. Sawyer v. Alton, 8 Scam. (Ill.) 180; Skinner v. Hutton, 83 Mo. 244. See chapter on Taxation, *post*.

Until the town, the plat of which is recorded, becomes incorporated, the streets are under the control of the county authorities, who cannot enlarge or diminish their width, but may direct how much thereof shall be worked or improved. Waugh v. Leech, 28 Ill. 488, 1862. Streets need not be recorded in the county records. Townsend v. Hoyle, 20 Conn. 1.

Unless authorized by statute, a county cannot use county funds to aid in the construction of *toll bridges*, or to aid a private individual in the construction of a free bridge. Colton v. Hanchett, 13 Ill. 615, 1852; Clark v. Des Moines, 19 Iowa, 198. In Iowa, counties have been held, under the legislation of that state, to have power to aid in the construction of *free bridges*, erected with the sanction of the proper municipal authorities, for public use, upon public lines of travel, within incorporated towns or cities. Bell v. Foutch, *et al.*, 21 Iowa, 119, 1866; Barrett v. Brooks, 21 Iowa, 44.

Rights of city as the purchaser of a *toll bridge*, and particularly as to the right to replace old bridge by a new one. Scott v. Des Moines, 84 Iowa, 552.

As to liability in Iowa of *county* for defective bridges *within* city limits. McCullom v. Blackhawk County, 21 Iowa, 409.

² Norwich v. Story, 25 Conn. 44, 1856. Duty of repair held to rest on the *town*, and not the city, the former being made liable by statute and the latter not. Guthrie v. New Haven, 81 Conn. 808

restricted in the acts of incorporation, to lay out and establish *county* roads, whose *termini* are wholly within, or which run through, an incorporated town or city—these corporations, unless expressly exempted, being subject to the operation and control of the general laws of the state.¹

Municipal Power over Streets, and their Uses.

§ 538. As the highways of a state, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may be put, depends entirely upon their charters or legislative enactments applicable to them. It is usual in this country for the legislature to confer upon municipal corporations very extensive powers in respect to streets and public ways within their limits, and the uses to which they may be appropriated. This will be illustrated everywhere throughout the present chapter. The authority to open, care for, regulate, and improve streets, taken in connection with the other powers

¹ Wells v. McLaughlin, 17 Ohio. 99; Butman v. Fowler, *Id.* 101, 1848; Swan's Ohio Stat. 796. Municipal charter held not to divest county authorities of their jurisdiction over part of the road lying within the limits of the town. Baldwin v. Green, 10 Mo. 410. Under the special act incorporating Bennington, it was held that the trustees of the village had not the exclusive authority to lay out highways within its limits, but that the general law upon the subject was still applicable. Bennington v. Smith, 29 Vt. (3 Wms.) 254, 1857.

Further as to power of county or township authorities with respect to roads and highways within the limits of incorporated towns and cities, see Pope v. Commissioners, &c., 12 Rich. (South Car.) Law, 407; Sharrett's Road, 8 Barr (Pa.) 89; Railroad v. Duquesne, 46 Pa. St. 223; Road Case, 14 Sergeant & Rawle (Pa.) 447; Newville Road Case, 8 Watts (Pa.) 172; Road in Easton, 8 Rawle (Pa.) 195; Road in Milton, 40 Pa. St. 300; Knowles v. Muscatine, 20 Iowa, 248; McCullom v. Blackhawk County, 21 Iowa, 409.

Extent of municipal control over *turnpike road* constructed in the streets of a city. State v. New Brunswick, 1 Vroom (N. J.) 395. See State v. Hoboken, *Id.* 225; Quinn v. Paterson, 3 Dutch. 35; State v. Passaic County, *Id.* 217.

Power over *plank road* in street. State v. Jersey City, 2 Dutch. (N. J.) 445; McKay v. Plank Road Company, 2 Mich. 138; Detroit v. Plank Road Company, 12 Mich. 383. See Regina v. Cottle, 3 Eng. Law & Eq. 474. *Post*, sec. 574.

usually granted, gives to municipal corporations all needed authority to keep the streets free from obstructions, and to prevent improper use, and to ordain ordinances to this end.¹ Thus, a city having "the care, supervision, and control of streets, squares, and commons" within its limits, may, by ordinance, prohibit the appropriation of these to private use, such as *sales* by individuals *at auction* thereon, or upon the sidewalks or streets.²

¹ *Philadelphia v. Railroad Company*, 58 Pa. St. 253; *Commonwealth v. Brooks*, 99 Mass. 484; *Dudley v. Frankfort*, 12 B. Mon. 610, 617; *Sinton v. Asbury*, 41 Cal. 525; *Mercer v. Railroad Company*, 36 Pa. St. 99; *Railroad Company v. Chenoa*, 43 Ill. 209; *Railroad Company v. Galena*, 40 Ill. 344; *Terre Haute v. Turner*, 36 Ind. 523.

The power to open new streets given in a city charter was held to be synonymous with the power to lay out and establish streets, and not merely to limit the authority of the city to opening streets already existing on the plan or plat of the corporation and its additions. *Hannibal v. Railroad Company*, Supreme Court of Missouri, 49 Mo. 480, 1872. Under such authority a city may open streets across the track of existing railroads within the city limits. *Id.*

Power to the common council of a city, by the charter, to adopt ordinances "to prevent the *cumbering* of streets, sidewalks," &c., in view of the distinction recognized in the charter, and which the legislation of Michigan had always made between cumbering and obstructing a public way, and encroaching upon it, was held to refer to impediments to travel placed in the open street, and not to actual enclosures of a portion of the street by fences, or occupation by buildings. *Grand Rapids v. Hughes*, 15 Mich. 54, 1866. Power to a city, by its charter, to regulate the use of streets and alleys, and to prevent and remove obstructions from them, contemplates the preservation of actual ways against nuisances which interfere with their accustomed use, and until they have become actually open, obstructions thereon, under a claim of title apparent on the face of the prosecution, cannot be punished under an ordinance in the municipal tribunal, but the rights of the parties must be determined in the public courts. *Jackson v. People*, 9 Mich. 111, 1860. See, also, *Warwick v. Mayo*, 15 Gratt. 528. A municipal corporation may cause *surveys of streets*, squares, and other public property to be made, and may employ a surveyor or engineer to furnish copies of an original map or a new map of the city or town. *People v. Flagg*, 17 N. Y. (3 Smith) 584, 1858; *Randall v. Van Vechten*, 19 Johns. 60, 1821.

Municipal power to regulate streets and sidewalks includes the power to determine the *width* of each. *State v. Morristown*, 83 N. J. Law, 57, 1868.

² *White v. Kent*, 11 Ohio St. 550, 1860. See, also, *Shelton v. Mobile*, 80 Ala. 540. Power of city to remove nuisances and obstructions on streets at the expense of the party creating them. See, generally, *Hawley v. Harrall*,

§ 539. So, authority to erect and keep in repair bridges and streets, confers by implication the power to employ the means necessary to that end, and among these means may be the passage of an ordinance inflicting a fine for *willful or negligent injuries thereto*. Power thus to protect the public property of the corporation could probably also be derived from the usual authority to regulate the police of the city.' The gutters and drains of a city intended to carry off *surface water* can be used by manufacturers and others, only by the consent, express or implied, of the local government; such use is unlawful if it result in a nuisance, and may be prohibited by the municipal authorities.'

§ 540. Power to make such ordinances "respecting *streets, wagons, carts, drays, &c.*, as to the council shall appear necessary for the *security, welfare, and convenience* of the city," authorizes an ordinance regulating the weight which wagons and other vehicles employed in the transportation of goods, wares, or produce of any kind, shall carry through the streets of the city. In thus holding, the court admitted that "an ordinance which would operate as a total exclusion of the right of the citizen to pass over the streets of the city with his loaded wagon and team would be unreasonable and void, as against common right; but the ordinance in question merely *regulates* the exercise and enjoyment of the right, and is valid.'"

19 Conn. 142. As to power of city highway surveyor and street commissioner over sidewalks, see *Noyes v. Ward*, 19 Conn. 250, 270; *Clark v. McCarthy*, 1 Cal. 453. Power to prevent sidewalks from being obstructed by *reins*. *Commonwealth v. Curtis*, 9 Allen, 266. Relation of sidewalk to street. See Index,—Taxation and Assessment. *Hart v. Brooklyn*, 36 Barb. 226. An *awning* erected without municipal consent may be declared an unlawful obstruction of a street. *Pedrick v. Bailey*, 12 Gray (Mass.) 161. *Ante*, sec. 253, note. *Post*, chap. XXIII. sec. 788, note.

¹ *Korah v. Ottawa*, 32 Ill. 121, 1863. See *Hooksett v. Amoskeag, &c. Company*, 44 N. H. 105. As to right of town to maintain case against wrongdoers for injuries to the public highways and bridges; right of street officer to prevent injury to street. *Clark v. McCarthy*, 1 Cal. 453.

² *Municipality v. Gas Light Company*, 5 La. An. 439, 1850. *Post*, sec. 644, chap. XXIII.

³ *Nagle v. Augusta*, 5 Ga. 546, 1848. Power to require *license* from persons using streets with heavy loads. *Gartside v. East St. Louis*, 43 Ill. 47. *Post*, sec. 604.

§ 541. *Public Nature of Streets.*—Whether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is, in either case, of the essence of the street that it is public, and hence, as we shall hereafter show, under the paramount control of the legislature as the representative of the public. Streets do not belong to the city or town within which they are situated, even although acquired by the exercise of the right of eminent domain, and the damages paid out of the corporation treasury. The authority of municipalities over streets they derive, as they derive all their other powers, from the legislature—from charter or statute.¹ The fundamental idea of a street is not only that it is public, but public for all purposes of free and unobstructed passage, which is its chief and primary, but by no means, sole, use.

§ 542. *Power to Improve and Graduate.*—That the use of the streets for travel may be made safe and convenient, the legislature usually confers upon the municipal authorities the power, in express terms, to *graduate and improve* them, and supplies the means to carry the power into effect by requiring the inhabitants to perform labor upon the streets or to pay specific taxes for that purpose, or taxes that may be so appropriated by the corporation. In another place will be considered more fully the liability of the corporation growing out of this power, in respect to maintaining the streets in a *safe* condition for travel. It will, however, be proper here to notice the nature of the power to grade and improve streets, as it has been judicially ascertained and settled. A leading case on this subject is that of *Goszler v. Georgetown*, decided by the Supreme Court of the United States.² By its constituent act, the corporation of Georgetown had “full power to make such by-laws and ordinances for the graduation and levelling of streets as they may judge necessary for the benefit of the town.” Pursuant to this authority, the corporation passed

¹ *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253; *Commonwealth v. Railroad Company*, 27 Pa. St. 339; *Allegheny v. Railroad Company*, 26 Pa. St. 355.

² *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593, 1821.

an ordinance for the graduation of certain streets, the first section of which appointed commissioners for that purpose. The second section of the ordinance was as follows: "Be it ordained, that the said level and graduation, when signed by the commissioners and returned to the clerk of this corporation, *shall be forever thereafter* considered as the true graduation of the streets so graduated, and be binding upon this corporation, and all other persons whatever, and be *forever* thereafter regarded in making improvements upon said streets." The plaintiff made improvements according to this grade, and *afterwards* the corporation passed another ordinance directing the grade to be changed by being lowered, to the plaintiff's injury. The plaintiff's bill for an injunction was dismissed, the court holding: 1. That the power to graduate given by the legislature was not exhausted by its first exercise, but was a continuing one: the power is given to the town to legislate on the subject, to pass as many by-laws relating thereto as the corporation "may judge necessary for the benefit of the town." 2. The second section of the ordinance (above quoted) was not in the nature of a compact, and therefore was not final and irrevocable. In deciding this point, Mr. Chief Justice *Marshall* says: "But it cannot be disguised that a promise is held forth (by the second section of the ordinance) to all who should build on the graduated streets, that the graduation should be unalterable. The court, however, feels great difficulty in saying that this ordinance can operate as a perpetual restraint on the corporation. When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract *which should so operate as to bind its legislative capacities forever thereafter*, and *disable it* from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abridge its own legislative power."

§ 543. That the *power to grade and improve streets*,

¹ *Goszler v. Georgetown*, 6 Wheat. 597. *Ante*, secs. 60, 61.

like other legislative powers, is a *continuing one*, unless the contrary be indicated, has been frequently decided in both the national and state courts. It may, therefore, be exercised from time to time, as the wants of the municipal corporation may require. Of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, are the judges.¹ And the law is also settled, as we shall have occasion hereafter more fully to illustrate, that, unless expressly so declared by charter or statute, a municipal corporation is not liable to property owners for the consequential damages necessarily resulting from either establishing a grade or changing an established grade of streets, although improvements were made in conformity with the first grade.² If the legislature gives a remedy in such cases, that remedy alone can be pursued.³

§ 544. *Municipal control over uses.*—The power of the public, or of the municipal authorities representing by

¹ *Smith v. Washington*, 20 How. (U. S.) 135; *O'Connor v. Pittsburg*, 18 Pa. St. 187; *Macy v. Indianapolis*, 17 Ind. 267, 1861; *Furman Street*, 17 Wend. 649; *Hoffman v. St. Louis*, 15 Mo. 651, 1852; *Markham v. Mayor*, 28 Geo. 402, 1857; *New Haven v. Sargent*, 38 Conn. 50, 1871; *Delphi v. Evans*, 36 Ind. 90, 1871; *McCormick v. Patchin*, Mo. Sup. Ct., 1873, not yet reported; *Gall v. Cincinnati*, 18 Ohio St. 563; *Plum v. Canal Company*, 2 Stockt. 256. *Contra*, under charter. *Oakley v. Williamsburgh*, 6 Paige, 262; *Goodall v. Milwaukee*, 5 Wis. 32; *Aurora v. Reed*, 57 Ill. 30. *Ante* sec. 62.

² Same authorities; *Taylor v. St. Louis*, 14 Mo. 20, 1851; *Hovey v. Mayo*, 43 Maine, 322, 1857; *Callender v. Marsh*, 1 Pick. 416; *Brown v. Lowell*, 8 Met. 172; *St. Louis v. Gurno*, 12 Mo. 414, 1849; *Hooker v. New Haven, &c. Company*, 14 Conn. 146; *Green v. Reading*, 9 Watts (Pa.) 382; *Mayor, &c. v. Randolph*, 4 Watts & Serg. (Pa.) 516; *Humes v. Mayor, &c.*, 1 Humph. (Tenn.) 403, 1839; *Lafayette v. Bush*, 19 Ind. 326; *Delphi v. Evans* (reviewing cases), 36 Ind. 90, 1871; *Creal v. Keokuk*, 4 G. Greene (Iowa), 47. In Kentucky, the right to change the grade without liability to pay damages is not absolute and unqualified. *Louisville v. Rolling Mill Company*, 3 Bush, 416, 1867. A change of grade is not shown to be illegal by an allegation that it was made "without any necessity therefor," because the council of the city are the judges of the necessity of the change. *Macy v. Indianapolis*, 17 Ind. 267, 1861. See, further, chap. XXIII. *post. Mode of exercising power to grade.* *Delphi v. Evans*, 36 Ind. 90.

³ *Hovey v. Mayor* 43 Maine, 322, 332; *Andover, &c. v. Gould*, 6 Mass. 40; *Boston v. Shaw*, 1 Met. 180.

delegated authority the public, over streets is not confined to their use for the sole purpose of travel, but they may be used for many other purposes required by the public convenience. In the author's judgment, the uses to which streets in towns and cities may legitimately be put are greater and more numerous than with respect to ordinary roads or highways in the country. With reference to these, all the public requires is the easement of passage and its incidents, and hence the owner of the soil parts with this use only, retaining the soil, and, by virtue of this ownership, entitled, except for the purposes of repairs, to the earth and the timber and grass growing thereon, and to all minerals, quarries, and springs below the surface; and he may maintain actions against those who obstruct the road or interfere with his rights therein.¹ But with respect to streets in populous places, the public convenience requires more than the mere right to pass over and upon them. They may need to be graded and brought to a level; and therefore the public or municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street or elsewhere, and may make *culverts, drains, and sewers* upon or under the

¹ *Barclay v. Howell's Lessee*, 6 Pet. 498, 512, *per McLean, J.*; *Bliss v. Ball*, 99 Mass. 597, 1868; *White v. Godfrey*, 97 Mass. 472; *Boston v. Richardson*, 13 Allen, 152, 153; *Stackpole v. Healey*, 16 Mass. 23; *Peck v. Smith*, 1 Conn. 103; *Adams v. Rivers*, 11 Barb. 393; *Griffin v. Martin*, 7 Barb. 298; *Jackson v. Hathaway*, 15 Johns. 447; *Webber v. Railroad Company*, 2 Met. 149; *Louisville v. Bank*, 3 B. Mon. 138, 158. *Ante*, secs. 492, 496.

In *Cincinnati v. White*, 6 Pet. 481, the Supreme Court observes that "all public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary for an appropriation of a highway in the country." This is manifestly true, and that is too narrow a view of the nature of a *street* which holds that the public gets nothing but a mere right of way, and that the adjoining owner retains as against the public every other right; the public must be taken to get every right necessary to the beneficial use and enjoyment of the street, and these rights in the streets of a populous place are much more enlarged and various than with respect to ordinary highways. Some of the cases have overlooked this difference, and applied too strictly the settled rules of the latter, in all their extent, to the former. See *ante*, sec. 496; *Cincinnati v. Penny*, 21 Ohio St. 499.

surface. Whether the municipal corporation holds the fee of the street or not, the true doctrine is that the municipal authorities may, under the usual powers given them, do all acts appropriate or incidental to the beneficial use of the street by the public, of which when not done in an improper and negligent manner, the adjoining fee holder cannot complain.¹

§ 545. Thus, although an easement only be acquired by the public, the municipal or local authorities may build a reservoir or *cistern in a street*, to retain water with which to sprinkle streets or extinguish fires.² In a case in Iowa,

¹ *Boston v. Richardson*, 13 Allen (Mass.) 146, 159, 1866, *per Gray, J.*; *West v. Bancroft*, 32 Vt. 367, 1859, *per Pierpont, J.*; *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253; *Kelsey v. King*, 32 Barb. 410; *New Haven v. Sargent*, 38 Conn. 50, 1871. This case expressly holds that the city, as against the adjoining owner, is entitled to the surplus soil of the street, and the adjoining owner was restrained from removing it. Compare *dictum* in *Cuming v. Prang*, 24 Mich. 514, 1872; and see *Delphi v. Evans*, 36 Ind. 90. In a case in Georgia, where it was held that the owner only parted with, and the city only acquired, a *right of way*, it was decided, but, in the author's judgment, erroneously, that stone within the limits of the street, which had to be removed in order to level and make the street passable, belonged to the adjoining owner as part of the soil, and not to the city as the owner of the right of way; and the latter could not, it was further held, use the rock that might result from the process of levelling for macadamizing or other street improvements, and the corporation was enjoined from so doing. *Smith v. Rome*, 19 Geo. 89, 1855. But in Maine it is held that a corporation which, by its charter, has power to repair and grade streets, may make such repairs and do such grading by authorizing others, at their own expense and under the direction of the street commissioner, to take the materials from the street for their own private use. *Hovey v. Mayo*, 48 Maine, 322, 1857. How power to grade must be exercised. *Delphi v. Evans*, 36 Ind. 90, 1871; *Terre Haute v. Turner*, 36 Ind. 522; *McGregor (city of) v. Boyle*, 34 Iowa, 269, 1872; *post*, secs. 800-802.

Although the fee of the streets of a city may be in the adjoining proprietor, subject to the public easement, yet the city, by virtue of its general authority over streets, may cause *sewers* to be made therein, and the owner is not entitled to have his damages assessed as for a new use or servitude. *Cone v. Hartford*, 28 Conn. 363, 1859. In this case the right of the city to make common sewers under the street was deduced from and regarded as an incident to its express and general authority to make and maintain highways and streets. *S. P. Fisher v. Harrisburg*, 2 Grant Cas. (Pa.) 291, 1854 *Post*, chap. XIX.

² *West v. Bancroft*, 32 Vt. 367, 1859.

occurring in a city where the fee of the soil in the street was in the adjoining proprietor, subject to the public easement, it appeared that the city corporation built a cistern in the street underneath the surface, near the line of the defendant's lot, and that subsequently the defendant erected a building on his lot on the line of the street, and in excavating for his cellar and foundation wall, and in taking the earth from under the sidewalk in the street, occasioned the destruction of the cistern, for which an action was brought against him by the city; and it was held that the action could not be maintained, because the fee of the street being in the defendant, subject to the public easement, the city had no right, without his consent, to construct the cistern. The court observe that, "subject to the public easement, the owner of the adjoining lots is the absolute owner of the soil of the streets, and retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not inconsistent with the public right of way."¹ So far as this case affirms that a municipal corporation cannot rightfully construct a public cistern, for municipal uses, in a public street, without the consent of the abutter holding the fee, it is directly opposed to the case from Vermont last cited, and to the sound and necessary principle above laid down, namely, that the city corporation may make every use of a street which reasonably conduces to the public convenience and enjoyment. It will never do to hold that a municipality invested with the control of streets and charged with the duty of preserving the public health, promoting the public convenience, and of making provision to extinguish fires, may not, if it deems it expedient, construct a subterranean reservoir or sewer in the middle of a street without the assent of the opposite lot owners.²

¹ *Dubuque v. Maloney*, 9 Iowa, 450, 461, 1859, *per Stockton, J.* In towns and cities platted under the code of Iowa, the lot owners do not hold the fee to the middle of the street, and have no other interest in the streets except a right of way common to the whole public. *Dubuque* and *Keokuk* are exceptions in this respect. *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Id.* 261; *Haight v. Keokuk*, 4 Iowa, 199; *Dubuque v. Maloney*, *supra*; *Dubuque v. Benson*, 23 Iowa, 248; *Des Moines v. Hall*, 24 Iowa, 234; *Cook v. Burlington*, 30 Iowa, 94, 1870. See chapter on Dedication, *ante*, secs. 492, 496.

² In *Glasby v. Morris*, 18 N. J. Eq. 72, 1866, it seems to be the opinion

§ 546. In Great Britain express legislative sanction is necessary to warrant the laying down of *gas pipes* in the public highways; and so in this country it is also considered that the right to the use of the public streets of a city by a gas company for the purpose of laying down its pipes, is a franchise which can be granted only by the legislature, or some local or municipal authority empowered to confer it.'

§ 547. A general grant of power in the charter of a city to cause it to be lighted with gas, while it carries with it, by implication, all such powers as are clearly necessary for the proper and convenient exercise of the authority expressly conferred, does not authorize the city council to grant to any person or corporation an *exclusive* right to use the streets of the city for the purpose of laying down gas pipes for a term of years, and thereafter, until the works shall be purchased from the grantee by the city. The court admitted that the power to light the city would authorize the council to contract for gas, and to grant the contracting party the use of the streets, but denied its authority to make such use exclusive for a determinate future period.'

of Chancellor *Zabriskie*, although the point is not much examined, that where the adjoining proprietors own the fee, a municipal corporation cannot construct a sewer in a public street without an express grant; and he held that in such a case the municipal corporation as against the adjoining owner's consent could not authorize a private person to build a subterranean drain in the street. See, however, *Cincinnati v. Penny*, 21 Ohio St. 499, 1871, which holds sewerage to be a legitimate use of a street. *Post*, chap XIX. *Ante*, sec. 544.

¹ *Regina v. Sheffield Gas Company*, 23 Eng. Law and Eq. 518; *Galbreath v. Armour*, 4 Bell App. Cas. 374; *Meen v. Gas Company*, 2 El. & El. 651; *Queen v. Charlesworth*, 16 Queen's B. 1012; *Regina v. Train*, 9 Cox Cr. Cas. 180; *Boston v. Richardson*, 13 Allen, 146, 160, by *Gray, J.*

² *State v. Cincinnati Gas Company*, 18 Ohio St. 262, 1868. As to power of municipalities to grant permission to lay down *gas pipes* in the streets, see, also, *Milhan v. Sharp*, 15 Barb. 210, *per Edwards, P. J.*; *Smith v. Metropolitan Gas Light Company*, 12 How. Pr. Rep. 187 (Supreme Court, Special term, 1855); *Norwich Gas Company v. Norwich City Gas Company*, 25 Conn. 19, 1856; *Smith v. Metropolitan Gas Company*, 12 How. Pr. 187; *People v. Benson*, 30 Barb. 24. Power to *light streets*, construed. *Nelson v. La Porte* 83 Ind. 258.

³ *State v. Cincinnati Gas Company*, 18 Ohio St. 262, 1868.

§ 548. In the *Norwich Gas Light Company v. The Norwich City Gas Company*, the plaintiffs claimed to have the *exclusive* right to the use of the streets and public places of the city of Norwich for the purpose of *laying down gas pipes* and distributing gas therein, and sought an injunction to restrain the defendant, a rival company, from using the streets for a similar purpose. Plaintiff's claim to an exclusive right to the use of the streets was based upon *an act of the city council*, in terms, giving such exclusive privilege. It appeared that the city did not own the soil or fee of the streets, but that this was in the adjoining proprietor, as in case of ordinary highways, subject to the public right of way, and the right of the city to regulate their use, by making by-laws "relative to the streets and highways of the city," "relative to public lights and lamps," &c. The court decided that while the act of the city council was a license which would protect the plaintiffs from a prosecution for a public nuisance for digging up the streets in order to lay down their pipes, it was inoperative (from want of power in the city) to confer upon them an exclusive right to the use of the streets for this purpose.¹

§ 549. The plaintiff's claim to an exclusive use of the streets was further based upon *an act of the legislature*, which gave them a right (but did not oblige them to exercise it), to use the streets of the city of Norwich to lay down gas pipes, &c., which right was declared to be exclusive against any and all persons or corporations," &c., with an exception not material to be noticed. When this act was passed, the defendant's works were far advanced. The court were of the opinion that the act gave the plaintiffs *no interest in the streets*, and that they could only sustain their bill for an injunction upon the idea that they have an interest in the street that is being interfered with, or threatened to be, by the defendants. The court were further of the opinion, and so held, that the act giving the plaintiffs the exclusive use of the streets was a restriction upon the

¹ *Norwich Gas Light Company v. Norwich City Gas Company*, 25 Conn. 19, 1856. This case is distinguished, and the power of the legislature to grant an *exclusive* right to a company to manufacture and sell gas is affirmed, in the *State v. Milwaukee Gas Company*, 29 Wis 454, 1872.

free manufacture and sale of gas, was a monopoly, and unconstitutional and void. The court distinguished this from the grants of ferry and bridge franchises which are founded upon an adequate consideration, in the obligation to accommodate the public, keep in repair, &c. But, remarks the court, "The grant to the plaintiffs appears to have been made without any consideration whatever for it. The plaintiffs are under no obligation to make gas, or suffer the gas they make to be used."¹ "As there was no consideration, public or private, reserved for the grant, and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade, in respect to which the government has no exclusive prerogative, we think that, so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by the means of pipes can be fairly viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the bill of rights, which declares that no man or set of men are entitled to exclusive public emoluments or privileges from the community, to render them void."

550. With reference to this decision, it may be remarked, that in order to induce the investment of capital in such enterprises, it is quite usual for the legislature, or city council by legislative authority, to grant exclusive privileges for a limited time. Whether the principles of this decision would be extended to such cases, or to cases where a consideration was received for the grant, or whether, without regard to these circumstances, the restriction on the power of the legislature therein declared will be followed

¹ A gas company is not, upon the general principles of the law, bound, in the absence of an express statute or contract, to furnish gas to all buildings on the lines of their main pipes, upon being tendered the fixed price, or a reasonable compensation. *Paterson Gas Light Company v. Brady*, 8 Dutch. (N. J.) 245, 1858

elsewhere, are questions which as yet remain to be settled. However it may be as respects the power of the legislature to make the grant *exclusive*, no such power, it is clear, can be exercised by a municipal council, unless it be plainly conferred by express words, or by necessary, or at least, reasonable implication.¹

§ 551. *Water Pipes*.—The use of streets for the purpose of laying down *water pipes* stands upon the same principles as their use for sewers and gas pipes. Where the charter gives to the city, in terms, the power to supply, or authorize the inhabitants to be supplied with water, the municipal council may use, or, as an incidental power, may permit the contractor to use, the streets for this purpose, and the adjoining feeholder is not entitled to compensation as for a new servitude, for it is not such, but only a proper or necessary use incident to a street in a populous place.²

§ 552. *Telegraph Poles*.—Legislative sanction directly given, or mediately conferred through proper municipal action, is necessary to authorize the use of streets for the posts of a telegraph company. If such posts be erected within the limits of a street or highway without such sanction, they are nuisances; but if the erection be thus authorized, they are not.³

¹ *People v. Benson*, 30 Barb. 24; *Ante*, sec. 296; *State v. Cincinnati Gas Company*, *supra*.

As to the power of the *state legislatures* under the amendments to the federal constitution to grant monopolies, see the "Slaughter House Cases," decided by the Supreme Court of the United States, Decr. Term, 1872.

² *Angell on Highways*, secs. 25, 312; *Milbau v. Sharp*, 15 Barb. 210, *per Edwards*, P. J.; *Kelsey v. King*, 32 Barb. 410. Water company compelled to lower pipes laid in a street by legislative sanction, so as to conform to a new grade established by municipal authority. *Commissioners v. Hudson*, 2 Beas. (N. J.) 420. Water company's liability for negligent escape of water from pipes. *Blyth v. Birmingham Water Works*, 4 Exch. (Hurl. & Gord.) 781.

³ *Commonwealth v. Boston*, 97 Mass. 555; *Regina v. Telegraph Company*, 9 Cox Cr. Cas. 174, cited in *Redfield on Carriers*, sec. 574, and note, where leading opinion of *Crompton*, J., is given; *Young v. Yarmouth*, 9 Gray, 386, construing the statute of Massachusetts. *Post*, sec. 796, note.

§ 553. *Openings in Sidewalks.*—In many cities lot proprietors upon streets are permitted to make openings in the sidewalks, in order to obtain an entrance into the basement or cellar, and also to make openings under the sidewalk to give additional cellar room. If the fee of the street is in the municipality in trust for the public uses, as it frequently is, it extends to the whole street, including the sidewalk, and the adjoining lot owner would, it seems clear, have no right as against the public, or the municipality charged with the control of the streets, to appropriate them to this use. To recognize such a *right* would be inconsistent with the public rights, which are paramount to the whole street, and to all uses and servitudes required, or which may be required, for the public benefit and convenience. But such uses may be permitted by the municipality when they do not interfere with the public interests, and are authorized by their charters. If the fee of the street is in the adjoining owner, as it frequently is, the question as to the rightfulness of such a use of the sidewalk may not be so plain, and yet, even in this case, the public right must be paramount to individual interests, and the rights of the public are not limited to a mere right of way, but extend, as we have shown, to all beneficial uses, as the public good or convenience may from time to time require. The use of the streets for sewers, tunneling, public cisterns, gas pipes, water pipes, and other improvements, might be seriously affected by the recognition of a *right* in the abutter to make at pleasure openings in, or even under, the sidewalk or street. The correct view would seem to be that all rights of this character must come from legislative declaration or municipal license, express or implied from general usage.

§ 554. Speaking of this subject, the Supreme Court of Illinois remark: "We are not prepared to admit that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal cellar under it, but as such a privilege is a great convenience in a city, and may, with proper care, be exercised with little or no inconvenience to the public, we think that the authority to make such cellars

may be implied, in the absence of any action of the corporate authorities to the contrary, they having been aware of the progress of the work." "But," the court adds, "while we infer a license thus to use a part of the public street, it is on the condition that the person doing so shall use *more than ordinary care and expedition* in the prosecution of the work. Neither the public nor other individuals derive any possible advantage from such a use of the sidewalk, but it is solely for the benefit of the person thus using it, and he must see to it that he does not endanger the safety of others, and that he incommodes the public as little as possible."¹

Railroads in Cities.—Use of Public Streets by Railroads.—Extent of Legislative and Municipal Authority.

§ 555. Reference is elsewhere made to the plenary power of the legislatures of the states in this country over all public ways, including not only common highways, but streets within the limits of municipalities. It has often been decided, and is settled, that the legislature has the power to authorize the building of a railroad on a street or highway, and may directly exercise this power or devolve it upon the local or municipal authorities.*

¹ *Nelson v. Godfrey*, 12 Ill. 22, 23. *Supra*, sec. 521, note. In New York it is held that where the lot owner holds the fee to the center of the street he has the right to excavate the soil *under the surface*, and to use the space for a basement or other uses which do not interfere with the public right of way. *McCarthy v. Syracuse*, 46 N. Y. 194, 1871. See *Fisher v. Thirkell*, 21 Mich. 1, 1870, referred to, *post*, sec. 794, note. "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation and much on public usage. The general use and acquiescence of the public is evidence of the right." *O'Linda v. Lothrop*, 21 Pick. 292, 297. *Infra*, secs. 585, 785, 794.

* *Mercer v. Railroad Company*, 36 Pa. St. 99, 1859; *Black v. Railroad Company*, 58 Pa. St. 249; *Philadelphia, &c. Railroad Company*, 6 Whart. 25, affirmed in *Commonwealth v. Railroad Company*, 27 Pa. St. 339, 854; *Green v. Reading*, 9 Watts, 382; *Henry v. Bridge Company*, 8 Watts & Serg. 85; *O'Connor v. Pittsburg*, 6 Harris, 189; *Railroad Company v. Adams*, 3 Head, 596; *Moses v. Railroad Company*, 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279; *Railroad Company v. Municipality*, 1 La. An. 128; 9 *lb.* 284; *Geiger v. Filor*, 8 Fla. 325; *Springfield v. Railroad Company*, 4 Cush. 63;

§ 556. If the *fee* in the streets or highways is in the public, or in the municipality in trust for public use, and is not in the abutter, the doctrine seems to be settled that the legislature may authorize them to be used by a railroad company in the construction of its road, without compensation to adjoining owners, or to the municipality, and without the consent, and even against the wishes, of either.¹

§ 557. But where the *public have only an easement* in the street or highway, it has been generally, but not always, held that against the proprietor of the soil the use of the street or highway for the purpose of a steam railroad is an additional burden, which, under the constitution of the

Tate v. Railroad Company, 7 Ind. 479; Railroad Company v. Daily, 13 Ind. 353; S. C., *Id.* 551; People v. Kerr, 27 N. Y. 188; Clinton v. Railroad Company, 24 Iowa, 455; Lackland v. Railroad Company, 31 Mo. 180; Porter v. Railroad Company, 38 Mo. 128, 1862; James River Company v. Anderson, 12 Leigh (Va.) 276; Chicago v. Robbins, 2 Black, 424. *Ante*, sec. 42. See Railroad Company v. Steiner, 44 Geo. 546, 1871; Vason v. Railroad Company, 42 Geo. 631.

A *different view* has been sometimes taken. Thus in *Donnaher v. The State*, 8 Sm. & Mar. 649, 1847, the court decided that where the statute under which a city was laid out vested the title of the streets in the city, that such streets cannot be subjected to the use of a railroad without the consent of the city, unless the damages to the city are assessed and paid. In other words, the legislature can only interfere with the use of the streets of the city by its exercise of the right of eminent domain; and if it exercises this right it must compensate the city. But this conclusion seems to have been adopted without sufficient reflection, and is undoubtedly erroneous. *Ante*, chap. IV. secs. 80-86.

In Great Britain *express legislative authority is necessary* to warrant streets to be used for the purposes of railways. *Galbreath v. Armor*, 4 Bell App. Cas. 374; *Queen v. Gas Company*, 2 Ellis & El. 651; *Queen v. Charlesworth*, 16 Q. B. 1012; *Regina v. Train*, 9 Cox Cr. Cas. 180; 1 Barn. & Ad. 80. On the right of railways to occupy highways, see *Redfield on Railways*, sec. 76, and notes.

¹ *Clinton v. Railroad Company*, 24 Iowa, 455, 1868; *S. P. People v. Kerr*, 27 N. Y. 188; *Railroad Company v. Applegate*, 8 Dana, 289; *Williams v. Railroad Company*, 16 N. Y. 97, *obiter*; *Wager v. Railroad Company*, 25 N. Y. 526; note observations on page 533; *Protzman v. Railway Company*, 9 Ind. 467; 13 Ind. 353; *Id.* 551; *Moses v. Railroad Company*, 21 Ill. 522. Distinguished, *Indianapolis, &c. R. R. Co. v. Hartley*, Ill. Sup. Court, June, 1878, 5 Chicago Legal News, 486, and disapproving *dicta* in 21 Ill. 543 and 29 Ill. 279. See *Cooley Const. Lim.* 555, 556, and notes; *Hinchman v. Paterson Horse Railroad Company*, 17 N. J. Eq. 75; *People v. Law*, 84

different states, cannot be imposed by the legislature without compensation to such proprietor for the new servitude.¹

Barb. 494; Railway Company v. Philadelphia, 47 Pa. St. 325; Carson v. Railroad Company, 85 Cal. 1868. City not liable to lot owner. Davenport v. Stevenson, 34 Iowa, 225.

¹ Williams v. Railroad Company, 16 N. Y. 97, 1857; Wager v. Railroad Company, 25 N. Y. 526, 1862; Mahin v. Railroad Company, 24 N. Y. 658; Fletcher v. Railroad Company, 25 Wend. 462; Bissell v. Railroad Company, 23 N. Y. 61; Davis v. Mayor, &c. of New York, 14 N. Y. 526; Carpenter v. Railroad Company, 24 N. Y. 655; Clarke v. Blackmar, 47 N. Y. 150, 1871; S. P. R. R. Co. v. Reed, 41 Cal. 256; Harrington v. Railroad Co., 17 Minn. 215, 224; Gray v. Railroad Company, 13 Minn. 315; Williams v. Plank Road Company, 21 Mo. 580; Ford v. Railroad Company, 14 Wis. 616; Pomeroy v. Railroad Company, 16 Wis. 640. Indianapolis R. R. Co. v. Hartley, *supra*. Scott, J., says: "A distinction has been taken where the municipality granting the right to lay the track owns the fee in the street and where the fee remains in the abutting land owner, and it seems to us that it rests on sound principles, and is supported by the highest authorities. Where the fee remains in the original proprietor it is immaterial how the public acquired an easement over the lands, whether by condemnation or by dedication, it is only for the use of ordinary travel, such as we are accustomed to see on streets or highways. In case the proprietor dedicated the land it was for no other purpose, and if it was condemned his damages were assessed with no other view. A different use of the land from that for which it was intended cannot be justified on the ground that a railway is an improved highway. Railway companies are only public corporations in a limited sense. The right of way, the road bed and the carriages propelled thereon, are owned by private individuals and not by the public. Fares are charged for travel thereon for the exclusive benefit of the parties owning the road. They are constructed and equipped in the interest of private speculation, but at the same time they are intended to subserve the public good. The travel on them bears no analogy to our notions of travel on an ordinary street or highway, where every one travels at pleasure in his own conveyance without paying tolls or fares. The uses are totally different, and even inconsistent. The one is exclusive, in favor of private interest, and the other is open and free to all. The doctrine most in consonance with our sense of justice is, where the fee of the street remains in the abutting land owner, the corporation may grant the right to a railway company to lay its track along or across any street, but the company avails of its privilege at its peril. If in laying its track it causes a private injury to him who owns the fee in the adjoining premises it must make good the damages sustained." And this, says Judge Cooley, appears to be the weight of judicial authority. Const. Lim. 549. And such is also the opinion of Judge Redfield. Redfield on Railways (3rd ed.) sec. 76, and note.

It is now firmly established as law in New York, by the cases above cited, that the use of a street or highway for a railroad is an *additional* burden beyond the public easement, which cannot be imposed by the legislature

§ 558. *Delegated Municipal Authority.*—The legislature, instead of granting, by direct act or general legislation, the power to railroad companies to occupy streets for the purpose of building and operating their roads, may delegate to municipalities the right to say when and upon what conditions, if at all, the public streets within their limits may be thus used.¹ The usual and ordinary powers of municipal

directly, or by a municipal corporation derivatively, without compensation to the owner of the fee, whether it be city lots or country property; that such use, without the consent of the fee owner, or acquiring the right under the law, by compensating him for it, is a wrong, for which trespass will lie, or ejectment to recover possession of the land, subject to the public easement. *Contra*, *Porter v. Railroad Company*, 33 Mo. 128. The author ventures to observe, however, that, in the absence of special constitutional restrictions, there is much to recommend the doctrine of the plenary power of the legislature over all streets and highways and public places, and their uses, which is asserted in the Pennsylvania cases, the leading one of which is the *Philadelphia, &c. Railroad Company*, 6 Whart. 25; affirmed, 27 Pa. St. 339, 354; criticised, *Williams v. Railroad Company*, 16 N. Y. 97, 106. See, also, *O'Connor v. Pittsburg*, 18 Pa. St. 187, 189; *Commonwealth v. Passmore*, 1 Serg. & Rawle, 217; approved, *Chicago v. Robbins*, 2 Black, 413.

¹ *Mercer v. Railroad Company*, 36 Pa. St. 99, 1859; *Railroad Company v. Leavenworth*, 1 Dillon C. C. R. 393, 1871; *Slatten v. Railroad Company*, 29 Iowa, 148; *Philadelphia v. Railroad Company*, 8 Grant (Pa.) 403; *Moses v. Railroad Company*, 21 Ill. 516; *Geiger v. Filor*, 8 Fla. 325; *Tate v. Railroad Company*, 7 Ind. 479; *Brooklyn, &c. Railroad Company v. Brooklyn, &c. Railroad Company*, 82 Barb. 358; *Railroad Company v. New York*, 1 Hilton (N. Y.) 562; *Hoyle v. Railroad Company*, 23 La. An. 535, 1871; *Railroad Company v. Reed*, 41 Cal. 256; *Mathews v. Kelsey*, 58 Maine, 56, 1870; *Wolfe v. Railroad Company*, 15 B. Mon. 404; *Commonwealth v. Railroad Company*, 27 Pa. St. 339; *People's Railroad v. Memphis Railroad*, 10 Wall. 38; *Brooklyn v. City Railroad Company*, 47 N. Y. 475, 1872.

Grant construed not to be *exclusive* in the grantee. *Brooklyn, &c. Railroad Company v. Coney Island, &c. Railroad Company*, 35 Barb. 364; 18 N. Y. 160; *Railway Company v. Kerr*, 45 Barb. 148; *Street Railroad Company v. City Railway Company*, 2 Duvall (Ky.) 175.

If a railroad company is authorized to occupy the street of a city, it possesses, as a necessary incident, the power to make a "turn-out" within the limits of the street, to communicate with the depot on the street. *Railroad Company v. Municipality*, 1 La. An. 128; *S. P. Knight v. Railroad Company*, 9 Ib. 284. Power to construct *railroad* in streets held to include sidings and branches to wharves. *Black v. Railroad Company*, 58 Pa. St. 249; *Philadelphia v. Railroad Company*, 1b. 253. Or to *Elevators*. *Clarke v. Blackmar*, 47 N. Y. 150, 1871.

corporations to regulate streets and keep them free from obstructions are not sufficient, it is believed, to empower them to authorize the use thereof for the purpose of constructing and operating thereon a *steam* railway, as these powers are not to be enlarged by construction, and were not conferred for this purpose.¹

§ 559. Where, under the general statutes of a state, a

¹ *Railroad Company v. Shiels*, 33 Geo. 601, 1863. In this case it was held that the usual municipal power over streets does not give the municipal authorities the right to authorize a railroad company to lay their track lengthwise on one of the streets of a city on a grade requiring deep excavations and high embankments, to the great damage of the adjoining owner. See *People v. Carpenter*, 2 Doug. (Mich.) 273. *Infra*, secs. 559, 560. In Kentucky, the doctrine is that the municipal authorities may consent to the use of streets by railway companies. *Railroad Company v. Applegate*, 8 Dana, 289, 1839; *Wolfe v. Railroad Company*, 15 B. Mon. 404, 1854; *Railroad Company v. Brown*, 17 B. Mon. 763, 1856. So, in Iowa, it has been decided that municipal corporations have the authority to authorize the use of streets by railway companies on such grade as their councils may prescribe; and that the company is not liable for the necessary damages to adjoining lot owners, resulting from the proper exercise of the power thus conferred. *Slatten v. Railroad Company*, 29 Iowa, 148, 1870. But under the statute, as construed, the right of a railroad company to occupy, *lengthwise*, a public street against the wish of the municipal authorities, is subject to equitable control and police regulations. *Railroad Company v. Mayor, &c.*, Iowa Supreme Court, April, 1873; *Ingham v. Chicago, &c. Railroad Company*, 34 Iowa, 249. See *City of Davenport v. Davenport & St. Paul Railroad Company*, before *Beck*, C. J., and *Cole*, J., at Chambers, 1873, not yet reported.

The act of Congress laying off the City of Burlington, Iowa, "reserved from public sale a strip of land along the bank of the river to remain forever for public use as a highway, and for other public uses:" held, that *abutting lot owners* acquired no title thereto, but did acquire the right to have the public trusts observed, and held, also, that the city authorities, while they could not alien the dedicated property, could permit the same to be used by a railway company as a right of way for its road, or for such other public uses as would justify the exercise of the right of eminent domain. *Cook v. Burlington*, 30 Iowa, 94, 1870. *Ante*, secs. 510, 511.

Where the common council was authorized by the legislature to permit any railroad to be laid along any street, subject to the same compensation to adjoining owners allowed under the general railroad law, the council may authorize the laying of a branch track to a private elevator, and it is not requisite that the ordinance giving the authority should provide for the compensation, as that is provided for in the statute. *Clarke v. Blackmar*, 47 N. Y. 150, 1871.

railroad company was forbidden to construct and operate its road upon the streets of an incorporated city, "without the assent of the corporate authorities," these are not limited to a simple granting or denial of the right of way, but may prescribe conditions on which they will give their assent. and if these are accepted by the railroad company, they are binding upon the parties; and, accordingly, where the right of way along a street was granted by a city, on condition that the company should build a depot in a certain part of the city and grade, rip-rap and pave the street it used, and the company agreed to accept it on these terms, it was held that it could not hold and enjoy the grant, and not comply with the conditions on which it was made.¹

§ 560. *Authority to Occupy and Use Streets—How Conferred, and Construed.*—Legislative authority to railroad companies to occupy the streets of an incorporated place, although it must exist to warrant the occupation, need not be expressly conferred, but may be given by necessary im-

¹ Railroad Company v. Leavenworth, 1 Dillon C. C. R. 393, 1871; S. P. Railroad Company v. Baltimore, 21 Md. 93; City Railroad Company v. City Railroad Company, 20 N. J. Eq. (5 C. E. Green) 61, 1869; Indianapolis, &c. Railroad Company v. Lawrenceburg, 34 Ind. 304, 1870.

In the Railroad Company v. Leavenworth, *supra*, an ordinance and contract, special in their terms, were construed to give the city a right to re-enter and take possession of the street, and remove the railroad track, on the failure of the company to comply with the conditions of the ordinance granting to it the right of way. The case also considers the principles which will, in such cases, govern the chancellor in granting or denying a temporary injunction against the city, to restrain it from taking possession of the street, and removing the rails, and preventing the running of the trains of the company.

Remedy by injunction by and against city corporation. Clinton v. Railroad Company, 24 Iowa, 455; S. C., *Ib.* 485, note; Railroad Company v. Baltimore, 21 Md. 93; Morris, &c. Railroad Company v. Newark, 2 Stock. Ch. 352; Milwaukee v. Railroad Company, 7 Wis. 85; *ante*, sec. 523, note; *post*, sec. 561. Remedy by injunction by adjoining owners. Zabriskie v. Railroad Company, 2 Beas. 814; Hinchman v. Railroad Company, 17 N. J. Eq. 75; Ford v. Railroad Company, 14 Wis. 609; Milburn v. Railroad Company, 12 Iowa, 246. *Post*, chap. XXII. Effect of delay by city in applying for injunction when assent has been given, but conditions have not been complied with. Railroad Company v. Baltimore, 21 Md. 93; Clinton v. Railroad Company, 24 Iowa, 485, note.

plication.¹ But a general grant to construct a railroad between certain *termini*, without prescribing its exact course or line, was considered to authorize the crossing of public highways, because this was necessary in order to execute the grant, but was not regarded as *prima facie* conferring the power to occupy highways longitudinally.²

¹ *Ante*, sec. 558. Commonwealth v. Railroad Company, 27 Pa. St. 339; Allegheny v. Railroad Company, 26 Pa. St. 355.

The implication must be a necessary one, and the legislative intent must appear with great clearness, to justify a company in laying their track through the entire length of a street, with a grade requiring deep excavations and high embankments, injurious to the adjoining property. Railroad Company v. Shiels, 38 Geo. 601, 1868.

² Clinton v. Railroad Company, 24 Iowa, 455, 480, 1868; Springfield v. Railroad Company, 4 Cush. 63, 1849, where the subject is fully considered by Shaw, C. J. And the court held that if the road, chartered by the legislature, could not be built [in Cabotville] without using a street or highway, so much of such street or highway might be used, although there were no express words to that effect in the charter, as should be "reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made." See, also, Roxbury v. Railroad Company, 6 Cush. 424, 1850; Brainard v. Railroad Company, 7 Cush. 506; Moses v. Railroad Company, 21 Ill. 516; Railroad Company v. Payne, 8 Rich. (South Car.) Law, 177; Commonwealth v. Railroad Company, 27 Pa. St. 339; Attorney General v. Railroad Company, 4 C. E. Green (N. J.) 586.

By construction of the statute in Massachusetts, a railroad corporation is primarily liable to third persons for damages caused to their estates by raising a street of a city so that its railroad may pass under the same; and this primary liability is not changed or affected by the fact that the city takes from the railroad company a bond of indemnity. Gardiner v. Boston, &c. Railroad Corporation, 9 Cush. 1, 1851. *Post*, sec. 747, note.

Where railroad alters highway it is bound, by effect of the legislation in Massachusetts and Connecticut, to restore the highway to a safe condition, and this obligation is a continuing one, and the railroad company cannot protect itself against the liability to indemnify the town, on the ground that the statute of limitations would bar an action against the railroad company for the original construction of the nuisance. The town may look to the railroad company which constructed the nuisance, and it is no defence, *it seems*, that at the time of the accident the road is in the hands of another company as lessee. Hamden v. Railroad Company, 27 Conn. 158, 1858, approving Lowell v. Railroad Company, 28 Pick. 24; Wellcome v. Leeds, 51 Maine, 313; Veazie v. Mayo, 45 Ib. 560; S. C., 49 Ib. 156. Respective rights of railroad company, the municipal corporation, and lot owners, growing out of the crossing of streets and highways by railroads, *see*, generally, Hughes v. Railroad Company, 2 Rh. Is. 493; Railroad Company

§ 561. A railroad laid out over or on a highway or street so as to obstruct it, without express statute authority or necessary implication, is liable to indictment as a nuisance.¹ And the company may be enjoined from laying down their track by the public authorities, or by lot owners specially injured.²

§ 562. Under general laws conferring upon railway companies the right of way over highways, and under special charters or general acts giving to incorporated places the right to grade, improve, regulate, and control public streets within their limits, embarrassing and difficult questions have arisen, depending for their solution upon the supposed intention of the legislature to be collected from the body of the legislation on the subject.³

v. Decatur, 33 Ill. 381; *Nicholson v. Railroad Company*, 23 Conn. 74. *Post*, sec. 796.

¹ *Commonwealth v. Railroad Company*, 14 Gray (Mass.) 93.

² *Railroad Company v. Shields*, 33 Ga. 601, 1863; *supra*, sec. 520, 522. City held to have power to lay a street over a railroad track. *Hannibal v. Railroad Co.*, 49 Mo. 480.

³ *Milburn v. Railroad Company*, 12 Iowa, 246; *Clinton v. Railroad Company*, 24 Iowa, 455; *Railroad Company v. Adams*, 8 Head (Tenn.) 596; *Drake v. Railroad Company*, 7 Barb. 508; *Milbau v. Sharp*, 15 Barb. 193; 27 N. Y. 611; *Plant v. Railroad Company*, 10 Barb. 26; *Adams v. Railroad Company*, 11 Barb. 414; *Railroad Company v. Reed*, 41 Cal. 256. Nature of right of company in street as against the abutter. *Ib.* *Redfield on Railways*, sec. 76.

Power in the charter of a city "to open, alter, abolish, widen, extend, grade, or otherwise improve or keep in repair streets," does not authorize the council thereof to grant the right to a railroad company to obstruct the street by permanent structures inconsistent with its use as a street. *Lackland v. Railroad Company*, 31 Mo. 180, 1860; *Same v. Same*, 34 Mo. 259. Read in connection, *Porter v. Railroad Company*, 33 Mo. 128. In the case last cited, it appeared that in the charter of the company it was authorized by the legislature to build its road "along or across any state or county road or street, or wharves of any city," but it "shall not be so constructed as to prevent the public from using the road, street, or highway along or across which it may pass;" and it was held that the ordinary use by a railroad under this charter, with the consent of the municipality, of a street was not a perversion of the highway from its original purposes, and that the resulting damage to adjoining property was *damnum absque injuria*. But the company is liable to one suffering special damages for using the street in an unauthorized and illegal manner. 34 Mo. 259, *supra*; Common-

§ 563. If a city, without authority from its charter or statute, and without rent or compensation, licenses individuals to occupy for their *private benefit*, a public street with a railroad, and other property owners suffer special damage, the city is not liable therefor even though the licensees may have given it a bond of indemnity. Such licensees are not the agents of the city, and the license does not authorize them to do any damage to others. If it had the power to grant such a license, "that power would not authorize it to make itself responsible for the acts of others, from which neither it nor its citizens derived any benefit, and which were not done for the accommodation of the public travel and business."¹ Such a case is to be distinguished from *tortious* acts done by the direction or procurement or sanction of a city corporation, for which it is liable.²

§ 564. Where there is legislative authority, either immediately, or through the authorized action of municipalities, for the occupation and use of streets for the uses of a railroad, this will protect the railway companies from prosecutions and suits for public nuisances, but it will not affect their liability to adjoining owners in those states where such owners are entitled to compensation for the additional servitude of such a use of their lands.³ There are cases which hold that when railroad companies are authorized to

wealth v. Railroad Company, 27 Pa. St. 339. *Measure of damages* where the lot owner brings *trespass* against the railroad company. Adams v. Railroad Company, 18 Minn. 260, 1872.

¹ Green v. Portland, 32 Maine (2 Reding.) 431, 1851; Roll v. Augusta, 34 Ga. 326, 1866.

"It is the settled law of this court, as well as in most of the other states of the Union, that it is a legitimate use of a street or highway to allow [under legislative authority] a railroad track to be laid down in it, and for so doing the city is not liable for any damages which may accrue to individuals." *Per Caton*, C. J., Murphy v. Chicago, 29 Ill. 279, 286, 1862.

² Thayer v. Boston, 19 Pick. 511; 12 Ib. 184. *Post*, chap. XXIII.

³ Fletcher v. Railroad Company, 25 Wend. 463, 1841; Mahon v. Railroad Company, Hill & D. Suppl. 156; Hamilton v. Railroad Company, 9 Paige, 171; Drake v. Railroad Company, 7 Barb. 508; Robinson v. Railroad Company, 27 Barb. 512; Ford v. Railroad Company, 14 Wis. 609, 1861; Protzman v. Railroad Company, 9 Ind. 467, 1857; Redfield on Railways, sec. 76, and notes; Railway Company v. Reed, 41 Cal. 256, 1871.

use streets, either by the legislature, or by competent municipal action, there is a liability, in certain cases, to the adjoining proprietor for consequential damages, other than for property taken; but questions of this character do not fall within the province of this work.¹

§ 565. *Municipal Control.—Rate of Speed.—Obstructions.*—Resulting from the power over streets, and to protect the safety of citizens and their property, municipal corporations, in the absence of legislative restriction, may control the mode of propelling cars within their limits, may prohibit the use of steam power, and regulate the rate of speed.² Although a railway passing through the streets of a city is not necessarily a nuisance, yet, if it is so operated as to be dangerous to private property, it may become a nuisance, and be indicted or otherwise proceeded against, accordingly.³ A municipal corporation, by virtue of its

¹ Railroad Company v. O'Dailey, 13 Ind. 353, 1859; S. C., 12 *Id.* 551; Lackland v. Railroad Company, 34 Mo. 259; Same v. Same, 31 Mo. 180; Porter v. Same, 33 Mo. 128; Hinchman v. Patterson Horse Railway Company, 17 N. J. (2 C. E. Green) 75-83; Zabriskie v. Railroad Company, 2 Beas. (N. J.) 314; McLaughlin v. Railroad Company, 5 Rich. (S. C.) Law, 583, 1850; Street Railroad Company v. Cummins, 14 Ohio St. 523.

In Indiana the fee simple of streets in towns and cities seems to be in the public; at all events, it is held that taking the street for the laying down of the track of a railroad is not taking such an "interest in the land" as, under the statute, will entitle the adjoining proprietor to the statutory remedy for compensation. Such proprietor may sue for the consequential injury, but cannot *restrain* on the ground that a railroad in a city is a nuisance. New Albany, &c. Railroad Company v. O'Dailey, 13 Ind. 353, 1859; S. C., 12 *Id.* 551; Protzman v. Railroad Company, 9 *Id.* 467, 1857. Further, as to nature of rights of adjoining lot owner in street, regarding the use of the street "as appurtenant to the lot," and as property: Haynes v. Thomas, 7 Ind. 38; Crawford v. Delaware, 7 Ohio St. 459; Cook v. Burlington, 30 Iowa, 24, 102; *Post*, sec. 788, and note. City council cannot, by its license, give a railroad company such a right to lay down a track in a public street as will protect it from an action by the adjacent lot owner who is injured by a change in the grade or elevation of the street. Protzman v. Railroad Company, 9 Ind. 467, 1857. Distinguished from Snyder v. Rockport, 6 Ind. 327, 1855. But see Slatten v. Railroad Company, 29 Iowa, 148, 1870.

² Donnaher v. State, 8 Sm. & Mar. (Miss.) 649, 1847; Redfield on Railways (2 ed.) 616; Railroad Company v. Buffalo, 5 Hill (N. Y.) 209. See ordinances—*ante*, sec. 326; Whitson v. Franklin, 34 Ind. 392, 1870.

³ Hentz v. Long Island Railway, 13 Barb. 646, 1852; State v. Tupper,

police authority and power over its streets, may enact an ordinance to prohibit cars from obstructing the crossing of its streets; and the court expressed the opinion that trains could be so made up, and the road so operated, as to make it unnecessary to block up the streets.'

§ 566. *Horse Railways in Streets.*—*Municipal Control.*—The power of municipal corporations to authorize the establishment of horse railways within their limits, or to authorize the use of the public streets for that purpose, has presented some interesting questions for adjudication. In a leading case—*Davis v. The Mayor of New York*¹—it appeared that the city corporation, by its charter, possessed general power to open, alter, repair, and regulate the streets. By virtue of this power, and without any express authority, mediately or immediately, from the *legislature*, the corporation of the city undertook, by resolution, to confer upon an association of persons the *exclusive* right to construct and maintain for a *term of years* a railway in Broadway for the transportation of passengers for profit. It was the opinion of five of the seven judges of the Court of Appeals taking part in the decision of the cause that the resolution was void. The judges delivering opinions discussed the question, whether the municipal government, in the exercise of their authority over the streets, might construct, or by mere license, revocable at pleasure, authorize others to construct, such a railway, but reached different conclusions upon it.

Dudley (S. C.) Law, 135, 1838. See, also, Redfield on Railways (2 ed.) 616, and authorities there cited. Pierce on Railways, 245-48. Such an ordinance held to operate throughout entire limits of city, including portions not platted into lots. *Whitson v. Franklin*, 34 Ind. 392, 1870. Construction of *special charter* on the subject: *State v. Jersey City*, 5 Dutch. (N. J.) 170, 1861. *Indictment: Post*, secs. 695, n.; 745, 747.

¹ *Railroad Company v. Galena*, 40 Ill. 344, 1866; *Railroad Company v. Chenoa*, 43 Ill. 209. An ordinance forbidding "any kind of obstruction" in the streets was deemed comprehensive enough to embrace the *obstruction of a street by a railroad company with its cars*. *Railroad Company v. Galena*, 40 Ill. 344, 1866; *Railroad Company v. Decatur*, 33 Ill. 381; *Gahagan v. Railroad Company*, 1 Allen (Mass.) 187.

² *Davis v. Mayor, &c.*, 14 N. Y. 506, 1856.

§ 567. The judgment of the court in the case just mentioned rests upon the sound principle that the powers of a corporation in respect to the control of its streets are held in trust for the public benefit, and cannot be surrendered or delegated by contract to private parties; and hence the resolution of the council authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation and without limit as to time, was not a license or act of legislation, but a contract; void, however, because if valid it would deprive the corporation of the control and regulation of its streets. "Taking the whole ordinance together," says *Comstock*, J., in his opinion, "it is no less than an abrogation by the common council of their powers and duties over and concerning the public streets, and a surrender of a considerable portion of those powers and duties into the hands of private individuals, or a private corporation. This the corporation of New York cannot do. Time and experience may give a very unfavorable solution to the question whether this railroad, or any railroad in Broadway, can be beneficial to the public, but the hands of the city government will be tied by the contract into which it has entered, and future change and improvement may be prevented by the voluntary surrender—in effect in perpetuity—of its own powers. On this ground the ordinance is void."¹ And this view was subsequently approved by the same court,² and is unquestionably sound.

§ 568. In Great Britain, legislative authority or sanction is necessary to enable the town or others to occupy the streets or highways for the purpose of a horse or street railway ;³

¹ *Per Comstock*, J., in *Davis v. The Mayor, &c. of New York*, 14 N. Y. 206, 532. Approved by *Clifford*, J., *arguendo*, in *People's Railroad v. Memphis Railroad*, 10 Wall. 88, 52, 1869.

² *Milbau v. Sharp*, 27 N. Y. 611, 1863; S. C., 15 Barb. 528; followed, *Coleman v. Railroad Company*, 88 N. Y. 201. These cases are to be distinguished from *Brooklyn v. City Railroad Co.*, 47 N. Y. 475, 1872. See *Hinchman v. Patterson Horse Railroad Company*, 17 N. J. Eq. (2 C. E. Green) 75; *City Railroad Company v. Memphis*, 4 Coldw. (Tenn.) 406, 1867. *Ante*, sec. 61.

³ *Galbreath v. Armour*, 4 Bell App. Cas. 374; *Queen v. Gas Company*, 2

and such is doubtless the law in this country.¹ Whether powers granted to municipalities will include the authority to consent to such a use of the streets by an authorized company, is one of construction, when the authority is not conferred in express and specific terms

569. The charter of New Orleans gave to the city the power "to *regulate* and *improve* streets," and to "regulate carts, &c., and vehicles of every description, thereon;" and a state law, in relation to public improvements, declared that "no railroad, plank road, or canal should be constructed through the streets of any incorporated city or town without the consent of the municipal council thereof." Under these circumstances, it was held competent for the city to grant the right of way in the streets to private individuals, for a specified time, for the purpose of laying down rails and running horse cars over them, according to a tariff to be fixed by the common council.²

Ellis & El. 651; Queen v. Charlesworth, 16 Q. B. 1012; Regina v. Trail, 9 Cox Cr. Cas. 180.

¹ Boston v. Richardson, 18 Allen (Mass.), 146, 160, *per* Gray, J.; City Railroad Company v. Memphis, 4 Coldw. (Tenn.) 406, 1867; Redfield on Railways (3 ed.) p. 317, top, where the valuable report of this learned and able jurist to the Massachusetts legislature, in respect to the rights and interests of *street railways*, is reprinted. After stating that it is not competent for any one to lay a passenger railway in the streets at his option, and that municipalities cannot create such companies, Judge Redfield, in the report above mentioned, observes that "it is now entirely well settled that such a franchise in the highways can only be created by legislative grant. It is a franchise to carry passengers and to demand tolls. This is one of the prerogatives of sovereignty, and derivable only through the action of the legislature. * * * It is not like ordinary mechanical or manufacturing business, which any one may institute at pleasure." *Id.* 319, 320.

In the charter of a street railway company, it was authorized to use the streets of a city upon obtaining the consent of the council, and by a supplement it was authorized to construct several tracks specified, no reference being made to any consent of the council; and it was decided that, as to such tracks, the consent of the council was unnecessary. Jersey City v. Railroad Company, 20 N. J. Eq. (5 C. E. Green) 360, 1869.

² Brown v. Duplessis, 14 La. An. 842, 1859. The Supreme Court of Louisiana, in the case just cited, in holding that the adjacent lot owners could not enjoin the city from authorizing the use of the public streets for laying down and operating horse railways, assign the following reasons for

§ 570. Aside from the question as to the right of adjoining lot owners to additional compensation, the legislature has the undoubted power to authorize at pleasure the use of streets for railroad purposes; and the usual extensive powers conferred upon municipal corporations to improve and control streets and regulate their use will, it is believed, ordinarily authorize them to use, or permit the use of, streets for *horse* railways, providing they do not surrender or abdicate their legislative and police powers and functions with respect to the streets and the persons or corporations thus licensed to use them. The legislature may authorize the municipalities to give or withhold an absolute assent to such a use of their streets, or it may leave them free to annex conditions, or it may itself require certain conditions

their judgment: "Streets, public walks, and quays are things which belong in common to all inhabitants of cities and other places, and to the use of which all the inhabitants of a city or other place and even strangers, are entitled in common (Civil Code, 449, 444-5). Plaintiffs cannot, then, claim an exclusive use of the streets, or complain if their use be impeded by a similar use of the streets by other persons. * * * No citizen has a legal right to complain that the streets are used by other citizens in a peculiar manner, even if it causes him a little inconvenience, so long as he himself is allowed the free use of the streets in his peculiar mode. The streets are destined for public use, but not for a *particular* mode of public use. If the city of New Orleans wished to expend the money necessary for the laying of rails throughout the city, for the purpose of permitting all who wished to run their own cars thereupon, drawn by horses or mules, no one could complain, so long as it did not prevent other modes of traversing the streets, for traveling in cars on rails is one mode of using public streets, and there is no reason in the nature of things why it should be lawful to travel in a carriage or gig upon the streets, and not lawful to travel in a car upon rails fixed in the streets, but not so laid as to prevent the use of the streets by other modes of conveyance. If it does not suit the public coffers or the public convenience that the city should lay rails for the free use of the public, it follows, from the premises [but see, on this point, *Davis v. The Mayor, &c., supra*], that the city has the prerogative of selling the right of way, for a specified time, to one or more persons, who shall lay rails and have the privilege of running cars, drawn by horses or mules, according to a tariff fixed by the common council. This does not impede the ordinary mode of use, promotes trade, unites distant parts of the city, benefits the health of citizens by enabling them to live beyond the crowded thoroughfares, and is not an alienation or appropriation of a portion of the public streets for private uses.' *Per Cole, J., in Brown v. Duplessis*, 14 La. An. 842, 1859. *Ante*, secs. 61, 566, 567.

to be met before the grant shall be made by the municipal authorities.¹

§ 571. Thus, by a statute of Ohio relating to the construction of street railways, city councils were prohibited from permitting their construction without "the consent of a majority in interest of the owners of the property upon the street being first had and obtained," and it was held that such consent was essential to the power of the city to grant such permission, and that the action of the city council giving permission did not conclude the property owner on the question whether the requisite majority had assented.² It was also decided in the same case that a second or additional track was in the nature of a new enter-

¹ *Railroad Company v. Baltimore*, 21 Md. 98; *Railroad Company v. Leavenworth*, 1 Dillon C. C. R. 393, 1871; *Frankfort Passenger Railway Company v. Philadelphia*, 58 Pa. St. 119, 1868; *Moses v. Railroad Company*, 21 Ill. 522; *Clinton v. Railroad Company*, 24 Iowa, 455; *People v. Kerr*, 27 N. Y. 188; *Hinchman v. Patterson Horse Railroad Company*, 17 N. J. Eq. (2 C. E. Green) 75; *Commonwealth v. Central Passenger Railway*, 52 Pa. St. 506; *Philadelphia v. Railroad Company*, 3 Grant (Pa.) 403; *Railroad Company v. O'Daily*, 12 Ind. 551; *Railroad Company v. Applegate*, 8 Dana (Ky.) 289; *City Railway Company v. Louisville*, 4 Bush (Ky.) 478; *Railroad Company v. Adams*, 3 Head (Tenn.) 596; *People v. Railroad Company*, 45 Barb. 78; *Sixth Avenue Railroad Company v. Kerr*, 45 Barb. 63; *McFarland v. Railroad Company*, 2 Beasl. (N. J.) 314; *Brooklyn, &c. Railroad Company v. Railroad Company*, 32 Barb. 358; *Railroad Company v. New York*, 1 Hilton (N. Y.), 562; *Mercer v. Railroad Company*, 36 Pa. St. 99, 1859; *City Railroad Company v. Memphis*, 4 Coldw. (Tenn.) 406, 1867; *City Railroad Company v. City Railroad Company*, 20 N. J. Eq. 61, 1869.

The extent of municipal power and control over street railways and common railways depends, of course, on the charter of the company and that of the municipality. See *State v. Hoboken*, 1 Vroom (N. J.) 225; *Middlesex Railroad Company v. Wakefield* (full discussion), 103 Mass. 262, 1869; *Frankford Passenger Company v. Philadelphia*, 58 Pa. St. 119; *New York v. Third Avenue Railroad Company*, 33 N. Y. 42; *Philadelphia v. Lombard, &c. Railroad Company*, 3 Grant (Pa.) 403; *Street Railway Company v. Cumminsville*, 14 Ohio St. 523; *McFarland v. Railroad Company*, 2 Beasl. (N. J.) 314; *State v. Jersey City*, 5 Dutch. (N. J.) 170; *Passenger, &c. Company v. Birmingham*, 51 Pa. St. 41; *Wolfe v. Railroad Company*, 15 B. Mon. (Ky.) 404; *Redfield on Railways*, sec. 76, and notes; *McFarland v. Horse Railroad Company*, 2 Beasl. Ch. (N. J.) 17; *State v. Herod*, 29 Iowa, 123, 1870; *Slatten v. Railroad Company*, 1b. 148; *Hobart v. Milwaukee, &c. Co.*, 27 Wis. 194; *Louisville, &c. Railroad Company v. Louisville*, 8 Bush (Ky.) 415, 1871; *Brooklyn v. City Railroad Company*, 47 N. Y. 475, 1872.

² *Roberts v. Easton*, 19 Ohio St. 78, 1869. *Ante*, secs. 417-420, 424.

prise, and required an independent consent of the property owners interested, and that those who had assented a year before to a single-track road could not be counted.¹ But even direct legislative authority to a street passenger railway corporation to carry passengers in cars over the streets of a city does not exempt that corporation from municipal control. Indeed, the principle is a general one, that when a business is authorized to be conducted by a corporation within a municipality, the latter presumptively possesses the same right to regulate it that it possesses over the like business if conducted by private persons.²

§ 572. *Rights and Liabilities of the Company.*—Rails laid down by a horse railroad corporation in a public street are the private property of the corporation, so that a rival corporation cannot use them on the ground that they, as part of the public, have the right to travel and run cars anywhere on such street.³ A street railway company au-

¹ *Id.* And it was further held in this case, that the act of the legislature forbidding city councils from permitting the streets to be used for a street railway without the assent of property owners thereon, recognizes in them such an interest as entitles *them* to an injunction against the construction of the road where the council granted permission without the requisite consent of the proprietors interested being obtained. *Ante*, sec. 522. As to second track: *Railroad Company v. Reed*, 41 Cal. 256, 1871.

² *Frankford Passenger Railway Company v. Philadelphia*, 58 Pa. St. 119, 1868; *State v. Herod*, 29 Iowa, 123, 1870; *City Railway Company v. Louisville*, 4 Bush (Ky.) 478.

³ *City Railroad Company v. City Railroad Company*, 20 N. J. Eq. 61, 1869; *Brooklyn Railroad Company v. Railroad Company*, 32 Barb. 358.

Street railway companies have an easement in the land or street on which their track is laid: it is private property, *subject to taxation*, and if no different provision be made, may be taxed as real property, or assessed for benefits derived from local improvements. *Street Railway Company Appeal*, 32 Cal. 499, 1867. *Post*, sec. 628. Passenger car on street railway is entitled, as against common vehicles, to *preference in the use* of its rails, and to an unobstructed road. *Wilbrand v. Eighth Avenue Railroad Company*, 3 Bosw. (N. Y.) 314.

Street railway company held *liable for an injury* to a traveler with carriage, caused by the projection of a spike, which ought not to have been permitted. *Fash v. Third Avenue Railroad Company*, 1 Daly (N. Y.) 148. It is the duty of the company, on the one hand, to exercise due care to avoid collisions, and the duty of travelers, on the other hand, to use proper diligence to avoid accidents and injuries. *Liddy v. St. Louis Railroad*

thorized by the legislature to lay down its track upon the streets of a city, subject to such restrictions as the city council might impose, constructed its track under the direction of the city engineer, but in such a manner in crossing a gutter as to cause surface waters to overflow and injure one of the adjoining proprietors, and it was held that the company was liable for the damages resulting from the improper construction of their track.¹ Where a street railway company, upon obtaining from the city authorities permission to lay down tracks upon the streets, covenanted in a bond executed to the city that it would keep the pavement of the streets within the tracks, and for a specified distance on each side thereof, in repair, this is binding upon it; and if the covenant is broken, and the party injured recovers of the city, it has its remedy over against the railway company upon the contract for the full amount it has been adjudged to pay.²

§ 573. Whether the use of a street for a horse railway is an *additional burden* upon the land of the adjoining proprietor, is a question upon which there is a diversity of judicial opinion. In New York it is considered to be a new servitude, for which the adjacent owner is entitled to compensation.³ But in Connecticut the opposite view is taken, although in that state it is declared to be the law, that a street or highway cannot be used for an *ordinary* railway without compensation for such use to the owner of the fee.⁴ And this is the prevailing opinion of the courts.⁵ The au-

Company, 40 Mo. 506; Lovett v. Railroad Company (injury to boy), 9 Allen, 557; Railroad Company v. Gladmon (injury to child), 15 Wall. 401, 1872; Burton v. Railroad Company, 4 Harring. (Del.) 252; Street Railroad Company v. Smith, 2 Duvall (Ky.) 556; State v. Foley, 31 Iowa, 527.

¹ Horse Railroad Company v. Deitz, 50 Ill. 210, 1869.

² Brooklyn v. City R. R. Co., 47 N. Y. 475. *Post*, sec. 795.

³ Craig v. Railroad Company, 39 N. Y. 404; S. C., 80 Barb. 449; Wager v. Railroad Company, 25 N. Y. 532.

⁴ Elliott v. Railroad Company, 32 Conn. 579; distinguished from Imlay v. Railroad Company, 26 Ib. 249, and that case commented on.

⁵ See opinion of Ranney, J., in Street Railway v. Cumminsville, 14 Ohio St. 523, 1863. And it is the opinion, also, of the learned Chancellor Zabriske, that a steam railway is, while a horse railway is not, an additional servitude. City Railroad Company v. City Railroad Company, 20 N. J. Eq.

thor regards the appropriation of a street for a horse railway, constructed and used in the ordinary mode, to be such a use as falls within the purpose for which the streets are dedicated or acquired under the power of eminent domain. When authorized or regulated by the public authorities, this a public use within the fair scope of the intention of the proprietor when he dedicates the street or is paid for property to be used as a street. Such proprietor must be taken to contemplate all improved and more convenient modes of use. There is solid ground to distinguish between horse railways in streets, as ordinarily laid and used, which do not exclude the public, and common railways, which are generally so constructed as altogether to exclude a portion of the street from public use in the accustomed modes; and yet, there is much to recommend as sound, the view that where property is dedicated to the public for a street, the dedicator must be presumed to intend that it may be used as a street in such way as the legislature representing the public, and best acquainted with the public needs, may authorize.

§ 574. Where the original proprietor parts with the fee, which is vested by statutes in some of the states, in the public, or in the municipality for the use of the public, the courts concur in holding that the legislature may, in such case, authorize the street or highway to be used for a street

61, 1869. See, also, to same effect, the opinion of *Green*, Chancellor, in *Hinchman v. Railroad Company*, 17 N. J. Eq. 75, 1864. Upon a full consideration of the adjudged cases upon the point, the Supreme Court of Wisconsin adopt the view that a horse railway on the public streets is not a new burden entitling the owner of the fee to compensation, unless, to use the language of Chief Justice *Dixon*, "such owner shows that he will suffer some private and peculiar injury by being deprived of that free access to his premises he would otherwise have and enjoy;" but it was held that the right of the owner of a store to have drays and vehicles stand transversely upon the street while discharging goods was not such an injury as to give the right to compensation. *Hobart v. Milwaukee City R. R. Co.*, 27 Wis. 194, 1870. It may be observed that the same court hold differently as to ordinary steam railways. *Ford v. Railroad Co.*, 14 Wis. 616; *Pomeroy v. Railroad Co.*, 16 Wis. 640; *ante*, secs. 556, 557. See, also, *Sargent v. Ohio, &c. R. R. Co.* 1 Handy, 52; *Commonwealth v. Temple*, 14 Gray, 75. *Post*, sec. 576.

railway, or even an ordinary railway, without his consent, and without compensation to him.¹

§ 575. In this section and the three following we *sum up the conclusions* to which our mind has arrived, after an examination of all of the reported cases upon the subject of railways in streets.

1. As respects ordinary railways, operated by steam, and street railways, operated by horses, legislative authority is necessary to warrant them to be placed in the streets or highways. The legislature may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads, whose tracks are constructed

¹ *People v. Kerr*, 27 N. Y. 188-211; S. C., 37 Barb. 357; *Clinton v. Railroad Company*, 24 Iowa, 455; *Railroad Company v. Applegate*, 8 Dana, 289; *Williams v. Railroad Company*, 16 N. Y. 97, *obiter*; *Wager v. Railroad Company*, 25 N. Y. 526, and note observations, 533; *Protzman v. Railroad Company*, 9 Ind. 467; *Railroad Company v. O'Daily*, 13 Ind. 353; *Moses v. Railroad Company*, 21 Ill. 522; *Railroad Company v. Leavenworth*, 1 Dillon C. C. R. 393-402; *Milburn v. Cedar Rapids, &c. Railroad Company*, 12 Iowa, 246. Mr. Justice *Cooley's* observations on the general subject are very interesting. Const. Lim. 545-557. *Ante*, sec. 491, *et seq.*

As to nature of *the franchises* in a charter to build and operate a street railway: See Redfield on Railways, sec. 76, and notes; *Metropolitan Railroad Company v. Quincy Railroad Company*, 12 Allen (Mass.) 262; *Railroad Company v. City Railway Company*, 2 Duvall (Ky.) 175; *Central Railroad Company v. City Railroad Company*, 32 Barb. 358; *Chicago v. Evans*, 24 Ill. 52; *City Railway Company v. City Railway Company*, 20 N. J. Eq. 61, 1869; *Street Railway v. Cumminsville*, 14 Ohio St. 523. This case holds that the mere use of a street for a street railway does not impose a new use, so as to give the abutters the right to compensation, but under a peculiar view in that state as to effect of a change of grade (see *Crawford v. Delaware*, 7 Ohio St. 459, and previous cases), grades once fixed and acted on cannot be altered to the damage of the adjacent lot owner. Nature of the rights of the company in *the street*, discussed by *Sawyer, J.*: *Street Railway Company Appeal*, 32 Cal. 499, 1867.

Rights of city under provision in charter of a street railway giving the city an *election to purchase at a future time*: *Cambridge v. Cambridge Railroad Company*, 10 Allen, 50. Effect of use, under legislative authority, of street by plankroad company: *Bagg v. Detroit*, 5 Mich. 336. *Ante*, sec. 537, n.

in the usual manner and whose trains are propelled by steam. But it is otherwise as respects street railways; and the ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit or refuse to permit the use of streets within their limits for such purposes. But they cannot, by an implied power, confer corporate franchises or authorize the taking of tolls. This must come from the legislature.

§ 576. 2. The weight of judicial authority at present, undoubtedly is, that where the public have only an easement in streets, and the fee is retained by the adjacent owner, the legislature cannot, under the constitutional guarantee of private property, authorize a steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude. The author, not disputing the justice of this view, or that it is the one best supported by the judgments of the courts, is of opinion that it will admit of fair debate, and deserves further consideration whether the power of the legislature over *uses* to which highways may be put is really subject to this supposed constitutional limitation. Although the decisions as to the right of the legislature in such case to authorize street railways without compensation to the adjoining freeholder, are conflicting, it is believed that such railways, as ordinarily constructed and used, do not create a new burden upon the land, and hence the legislature is not bound to, although it may, provide for compensation to the adjoining proprietor.

§ 577. 3. Where the *fee* of the street is in the municipality in trust for the public, or in the public, the control of the legislature is supreme, and it may authorize or delegate to municipal bodies the power to authorize either class of railways to occupy streets without providing for compensation either to the municipality or to the adjoining lot owners. But where grades are altered, or actual damages will be caused by such use, the legislature ought to provide that the abutters should be compensated for the injury they will sustain.

578. 4. As special legislative authority is necessary to enable a company to construct a passenger railway in the streets, the effect of such authority, when obtained and acted upon, is to give the company a property in the franchise and road, and hence no rival company has the right to use the track of the company which laid it down. Nor can an individual or another company, at pleasure and without legislative authority, construct a rival line in the same highway. But a legislative grant of authority to construct a street railway is not exclusive unless so declared in terms, and therefore the legislature may, at will, and without compensation to the first company, authorize a second one on the same streets or line, unless it has disabled itself by making the first grant irrevocable and exclusive. Whether it can effectually disable itself in this manner of its control over highways, is a question of a nature elsewhere referred to, and which it is not necessary to discuss in this place. But whatever may be the extent of legislative power in this respect, it is clear to our mind that the legislature cannot, without compensation to the first company, authorize the second company to take or use the track of the first, although with compensation this might be done under the power of eminent domain, if, in its judgment, the public good required it. The extent of municipal police and other control over street railways depends, of course, upon their charters, and the legislation of the state touching the subject.¹

§ 579. *Bridges*.—Having considered the relation of municipal corporations to streets and highways within their limits, it remains to refer briefly to bridges. Bridges are usually part of the street or highway,² and in this country the power of municipal corporations to build them, and their authority over them, are wholly statutory, and their duties in respect to them are either prescribed by statute or

¹ Since the above was written, the author is gratified to learn that his views are coincident with those expressed by Chancellor *Zabriskie* in his able opinion in the *City Railroad Company v. City Railroad Company*, 20 N. J. Eq. (5 C. E. Green) 61, 1869.

² *Chicago v. Powers*, 42 Ill. 169, 1866; *Manderschid v. Dubuque*, 29 Iowa, 78, 1870

spring from their powers. There is no common law responsibility on municipal corporations in respect to the repair of bridges within their limits; but where bridges are part of the streets, and built by the municipal authorities under powers given to them by the legislature, they are liable for defects therein, on the same principles and to the same extent as for defective streets, and therefore no extended separate treatment in this place is necessary.'

¹ *Id.* Smoot v. Wetumpka, 24 Ala. 112, 1854; Richardson v. Turnpike Company, 6 Vt. 496, 1834; Turnpike Company v. Berry, 5 Ind. (Port.) 286, 1850; Humphreys v. County, 56 Pa. St. 204, 1867; Cooley v. Freeholders, 3 Dutch. (N. J.) 415, 1859; Mechanicsburg v. Meredith, 54 Ill. 84, 1870. *Post*, chaps. XX. XXIII.; Chicago v. McGinn, 51 Ill. 266.

Bridge defined: State v. Gorham, 37 Maine, 451; Regina v. Derbyshire, 2 Q. B. 745; Sussex v. Strader, 3 Harris. (N. J.) 108. The word "bridge" may embrace within its meaning such abutments as are necessary to make the structure accessible and useful. Tolland v. Willington, 26 Conn. 578; Bardwell v. Jamaica, 15 Vt. 438; Board, &c. v. Strader, 3 Harris. (N. J.) 108; Rex v. West Riding, 7 East, 596. *Approaches to*: Commonwealth v. Deerfield, 6 Allen, 449. Both by the common law and the statute of 22 Henry VIII., affirming it, the duty of repairing public bridges rested upon the county in all cases where no private person or other body is specially charged therewith. 2 East, 342, 356; 2 Inst. 700, 701; Hill v. Supervisors, 12 N. Y. (2 Kern.) 52, 1854. See Follett v. People, *Id.* 263, 273, relating to obligations of pier proprietors under statute to maintain a bridge; also, on same point, The People v. Cooper, 6 Hill, 516; 2 Comst. 165, 173. In New York this common law responsibility of counties never prevailed; but, by statute, this responsibility is primarily upon the towns. Hill v. Supervisors, 12 N. Y. (2 Kern.) 52, 1854; Bartlett v. Crozier, 17 Johns. 439. A provision in a statute that a certain bridge, when completed, shall be a public bridge, and "under the control of the county supervisors," makes it a county charge. The People v. Supervisors, 1 Hill, 50, 1841. Whether *mandamus* lies to compel the body bound to repair bridges and highways to do so, or whether the remedy is by indictment, *quare*. 1 Hill, 50, *supra*. *Post*, sec. 673. If a bridge is built by an individual for his own exclusive benefit, over a highway, he is bound to keep it in a safe condition, or respond to an action for damages to any person injured by his omission. *Per Nelson, J.*, in Heacock v. Sherman, 14 Wend. 58, 1835; 13 Co. 33; 1 Bac. Ab. tit. "Bridges," 535, note; 2 East, 842; 5 Burr. 2594; 13 East, 220; Woolrych on Ways and Bridges, 202, 204, and cases; 1 Salk. 359; 2 Blacks. 687. How long this obligation continues, where bridges become useful to, and are generally used by, the public, see 14 Wend. 58, *supra*. As to the repair, by the public, of bridges originally built by private persons, see also Bisher v. Richards, 9 Ohio St. 495, 502, *per Gholson, J.*; State v. Campton, 2 N. H. 518; Dygert v. Schenk, 23 Wend. 446; Requa v. Rochester, 43 N. Y. 129, 1871; Sampson v. Goochland, &c., 5 Gratt. (Va.)

§ 580. An incorporated town, being charged with the control over its streets and the duty to improve the same, may legitimately contract for the *construction of free bridges* over a stream dividing its streets, and issue its warrants or orders to raise money to be so invested. But such corporation has no power to execute a deed of trust conveying a bridge erected by the corporation to trustees, authorizing the charging of tolls thereon, and pledging the bridge and the tolls collected thereon for the payment of the debt created for its construction.¹ A city corporation, invested with the ordinary powers over streets, was held to be authorized to provide for the construction of a free bridge across a river running through it, upon ground dedicated and set apart for a street, although the city was laid off on only one side of the river, but was approached from the other side by a road touching the river where the bridge was located.²

241; *Monmouth v. Gardiner*, 35 Maine, 247; *Railroad Company v. Duquesne*, 46 Pa. St. 223; *Smoot v. Wetumpka*, 24 Ala. 112, 1854; *Indianapolis v. McClure*, 2 Ind. 147, 1850. Powers and duties of cities in respect to *bridging canals* which intersect their streets. *Korah v. Ottawa*, 32 Ill. 121; *Joliet v. Verley*, 35 Ill. 58; *Towles v. Justices*, 14 Geo. 391; *Turnpike Company v. Berry*, 5 Ind. 286, 1850; *Scott v. Chicago* (bridges over river in city limits), 1 Bissell, 510, 1866; *Chicago v. Powers*, 42 Ill. 169, 1866. No common law obligation on canal company to bridge a highway laid out subsequent to making of canal. *Company v. State*, 4 Zab. (N. J.) 62. Where a city lawfully builds, over a navigable river, a bridge constructed with a draw, the right to navigate the river, and the right to cross the bridge, co-exist and qualify each other, but such a bridge must not materially obstruct the navigation of the river; and the city, if charged with the *duty of working and keeping the draw open*, is *civilly liable* to a navigator for negligence, causing damage, in the performance of this duty. *Scott v. Chicago*, 1 Bissell, 510, 1866. Measure of damages in such case stated by *Drummond, J.* *1b. Municipal power to protect.* *Hooksett v. Amoskeag, &c. Company*, 44 N. H. 105; *Korah v. Ottawa*, 32 Ill. 121, 1863; *Troy v. Railroad Company*, 3 Fost. (N. H.) 83, 1851; *Freedom v. Ward*, 40 Maine, 383; *County Commissioners v. Holcomb*, 7 Ohio, pt. 1. 232; *Calais v. Dyer*, 7 Greenl. (Me.) 155; *Andover v. Sutton*, 12 Met. 132; *Monmouth v. Gardner*, 35 Maine, 247. *Ante*, sec. 536, n.

¹ *Mullarky v. Cedar Falls*, 19 Iowa, 21, 1865; *Dively v. Cedar Falls*, 27 Iowa, 227; *Clark v. Des Moines*, 19 Iowa, 199; *Chicago v. Powers*, 42 Ill. 169; *Corey v. Rice*, 4 Lansing (N. Y.) 141, 1871.

² *Dively v. Cedar Falls*, 27 Iowa, 227. *But not a toll bridge.* *1b.*; *Mul-*

Limitations on the Right of Free Transit and Use.

§ 581. We have heretofore shown that the primary purpose of a street is for passage and travel, and that unauthorized and illegal obstructions to its free use come within the legal notion of a nuisance. But it is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations. The carriage and delivery of fuel, grain, goods, &c., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvement of adjoining lots by digging cellars, by building, &c.; this may occasion a reasonable necessity for using the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to, or limitations of, it. They can be justified only when, and only so long as they are, *reasonably necessary*. There need be no *absolute* necessity; it suffices that the necessity is a *reasonable* one. But this will never justify the leaving of the street or way in an unsafe and dangerous condition, or its use in an unreasonable manner or for an unreasonable time.¹

larky v. Cedar Falls, 19 Iowa, 21; *Bell v. Foutch*, 21 Iowa, 119; *Barrett v. Brooks*, *Id.* 144. *Ante*, sec. 580.

A municipal corporation cannot, without express authority, erect a *toll bridge and levy and collect tolls*. *Clark v. Des Moines*, 19 Iowa, 198; *Colton v. Hanchett*, 13 Ill. 615, 1852.

¹ *Angell on Highways*, chap. VI.; *Hawk. P. C.* chap. LXXVI. sec. 49; *Clark v. Fry*, 8 Ohio St. 358, 373, 1858, *per Bartley, C. J., arguendo*; *People v. Cunningham*, 1 Denio (N. Y.), 524; *Rex v. Jones*, 3 Campb. 231; *O'Linda v. Lothrop*, 21 Pick. 292, 1838; *Rex v. Ward*, 4 Ad. & El. 405, relating to a hoard erected for repairing a house; *Rex v. Russell*, 6 Barn. & Cress. 566, as to temporary acts of loading coals in keels; *Rex v. Cross*, 3 Campb. 226; *Rex v. Jones*, 6 East, 230.

In *Commonwealth v. Passmore*, 1 Serg. & Rawle, 217, the Supreme Court of Pennsylvania, speaking of this subject, says: "*Necessity* justifies actions

§ 582. As a city corporation may be compelled to pay damages caused by the negligent manner in which persons occupy or use sidewalks and streets with *building material*, it may impose reasonable conditions on those who wish thus to use or occupy the streets or sidewalks--as, for example, require them, by ordinance, to give bond to indemnify the

which would otherwise be nuisances; this necessity need not be absolute—it is enough if it be reasonable. No man has a right to throw wood or stones into the street at pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand, and other materials, may be placed in the street, provided it be done in the most convenient manner," and be not unreasonably prolonged. Approved, *People v. Cunningham*, 1 Denio (N. Y.) 524, 530; *Clark v. Fry*, 8 Ohio St. 358, 374; *Rex v. Cross*, 3 Campb. 226; *St. John v. New York*, 8 Bosw. (N. Y.) 483. In *Wood v. Mears*, 12 Ind. 515, 1859 (an action for special damages against the author of the obstruction), it was held a street of a city may be obstructed by placing material for building in it for a reasonable time and so as to occasion the least inconvenience, if, *from want of room elsewhere, it be reasonably necessary to deposit it in the street*; and a plea is defective which does not aver or show this reasonable necessity, as it cannot be judicially inferred from the fact that the building was being erected in a populous city. Undoubtedly, a man in the pursuit of his lawful business will be excused for acts which, if wantonly done, would be regarded as nuisances, yet no considerations of private interest or convenience will justify a person in the pursuit of his business unreasonably to incommode the public or interfere with their right to the free use of the street. Angell on Highways, sec. 231. The law on this point is well stated by the court in *Rex v. Russell*, 6 East, 427: "That the primary object of the street is for the free passage of the public, and any thing which impeded that free passage, *without necessity*, was a nuisance. That if the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could be conveniently contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot." Same principle applied to congregation of carts in the public streets for the reception of slops from a distillery. *People v. Cunningham*, 1 Denio (N. Y.) 524. To the keeping of *coaches at a stand* in the street, waiting for passengers. *Rex v. Cross*, 3 Campb. 226. To a *timber merchant* depositing timber in the street. *Rex v. Jones*, 6 East, 230. And see, also, *Rex v. Carlisle*, 6 Carr. & P. 636; *Rex v. Moore*, 3 B. & Ald. 184. What uses of streets permissible, discussed. *Norristown v. Moyer*, 67 Pa. St. 855, 1871.

Moving building on suitable streets, with expedition and care, is permissible. *Graves v. Shattuck*, 85 N. H. 257.

Temporary obstruction of street by loading and unloading cars. *Mathews v. Kelsey*, 58 Maine, 56, 1870.

city against losses or damages caused by the manner in which the privilege to use and occupy the sidewalks and street is exercised.¹

§ 583. A city council having "exclusive power over streets," has the right to determine, by ordinance, to what extent, and under what circumstances, they may be incumbered with *building materials*, and such an ordinance will protect parties acting under it, not only from a prosecution by the city, but from actions by third persons, when such actions are not grounded upon the negligence of the defendant.²

§ 584. Authority by the charter to a municipal council to make "salutary and needful by-laws," authorizes an ordinance prohibiting the obstruction of any street for the purpose of building "without the written license of the mayor and aldermen;" and under such an ordinance an agreement made in consideration of such license from the mayor *alone* is void, and no action lies thereon.³

§ 585. The owners of lots bordering upon streets or ways have, or may have, in other respects, a right to make a *reasonable and proper use* of the street or way. What may be deemed such a use depends, in the absence of legislative or authorized municipal declaration, much upon the local situation and public usage—that is, the use which others similarly situated make of their land—this being evidence of a reasonable use.⁴ Conformably to these principles, it was held that common and well established usage in the city of Boston justified the owners of land in erecting thereon, but on the line of the street or way, warehouses with *doors and windows opening upon the way or street*, and shutters projecting into the same, when open, and with side-

¹ McCarthy v. Chicago, 53 Ill. 38, 1869.

² Wood v. Mears (action against builder for injuries caused by building materials deposited in street), 12 Ind. 515, 1859; distinguished, Ball v. Armstrong, 10 Ib. 131. *Supra*, sec. 581, n.

³ Lowell v. Simpson, 10 Allen, 88, 1865.

⁴ O'Linda v. Lothrop, 21 Pick. 292, 297, 1838; Gerard v. Cook, 2 Bos. & Pul. 109, 1806; Underwood v. Carney, 1 Cush. 285, 292, 1848, *per Forbes*, J.

walks in front, having on their surface *iron gratings* for admitting light to, and *trap doors* for communicating with, the cellar or underground apartments of the warehouses, and used for putting in and taking out goods.¹ So, for the same reasons, it is not an unreasonable use of a street in a populous place, where land is valuable, so to erect structures as that the *gates and doors*, when opened, swing over the line of the street. Whatever may be the rights of the public, certain it is that these acts do not constitute a trespass upon the owner of the soil of the street.²

¹ *Underwood v. Carney*, 1 Cush. 285, 1848; 21 Pick. 297, *supra*. *Ante*, sec. 558. As to liability of city for these openings, if unsafe and dangerous, see *Bacon v. Boston*, 8 Cush. 174, 1849; *Lowell v. Spaulding*, 4 *Id.* 275. *Post*, secs. 785, 794.

² *O'Linda v. Lothrop*, 21 Pick. 292, 1838. *Supra*, sec. 538, *et seq.* Very recently, *Paxon, J.*, of the Common Pleas Court in Philadelphia, in *Philadelphia v. Presbyterian Board of Publication*, held that where the ashlar or true line of a building conformed strictly to the line of the street, but the ornamental parts encroached on it, an injunction would not be granted to restrain the erection of such building, especially as this has been the custom for years in Philadelphia, and councils have not legislated on the subject. 29 Leg. Int. 53. *Supra*, sec. 521; *Commonwealth v. Blaisdell*, 107 Mass. 284, 1871.

CHAPTER XIX.

MUNICIPAL TAXATION AND LOCAL ASSESSMENTS.

§ 586. We have elsewhere had occasion to refer to the *subject of taxation* in relation to the powers and duties of municipalities.¹ It is chiefly in virtue of this power that the revenues are acquired by which municipal expenses are borne, and debts and liabilities paid. And it is, as we shall presently see, by virtue of a branch of this great power that local assessments upon property benefited, or legislatively declared or supposed to be benefited, are imposed, in order to pay the expense of making local improvements of a public nature within the municipality, adjoining or near the property assessed. It does not belong to the present work to treat at length of the power of taxation by the state and the limitations upon it. We shall confine ourselves to a consideration of the subject as connected with municipal corporations, and to the peculiarities which are impressed upon the power when exercised by municipalities, under authority conferred upon them by the legislature.²

§ 587. The *taxing power of the state* consists in its authority to levy and collect taxes, and assessments, which are in the nature of special taxes; and *taxes* (including, in the term, assessments) are burdens or charges imposed by the legislature, or under its authority, upon persons or property, to raise money for *public*, as distinguished from *private, purposes*, or to accomplish some end or object *public in its nature*. There can be no legitimate taxation to raise money unless it be destined for the uses or benefit of the

¹ *Ante*, chap. I. sec. 9, note; chap. II. sec. 13; chap. IV. secs. 34, 35, 36, 41, 44; chap. V. secs. 64, 65; chapter on Mandamus, *post*.

² The constitutional aspects of the subject have been well treated, both by Mr. Sedgwick (Statutory and Const. Law, chap. X.) and by Judge Cooley (Const. Lim. chap. XIV.) Mr. Blackwell's treatise on the subject of tax titles is well known to the profession, and chap. XXXI. of that work is upon the subject of tax sales by municipal and other corporations.

government or some of its municipalities, or divisions invested with the power of auxiliary or local administration. A public use or purpose is of the essence of a tax.¹ Theoretically, the tax-payer is compensated for the taxes he pays in the protection afforded to him and his property by the government which exacts the tax; but the substantial foundation of the power is political, civil, or governmental necessity, and taxes are largely, if not wholly, as Mr. Mill contends, sacrifices for the public good, "equality of sacrifice" being the rule dictated by justice.² Equality, indeed, so far as practicable, is inherent in the very idea of a *tax*, as distinguished from an arbitrary exaction, and in many of the states is enjoined, as we shall presently perceive, by constitutional provision.

¹ *Hanson v. Vernon*, 27 Iowa, 28, 47, 1869, and see authorities there cited, defining *taxes*; *People v. McCreery*, 84 Cal. 432; *Hilbish v. Catherman*, 64 Pa. St. 154, 1870; *Warren v. Henly*, 31 Iowa, 81, *per Beck, J.*; S. C., 5 West. Jurist, 101; *S. & V. R. R. Co. v. Stockton*, 41 Cal. 149; *Allen v. Inhabitants of Jay*, Sup. Court of Maine, 1871, 12 Am. Law Reg. N. S. 481, and note of Judge Redfield.

"I concede," says *Black, C. J.*, in *Sharpless v. Philadelphia*, 21 Pa. St. 147, 167, "that a law authorizing taxation for any other than public purposes is void. * * * A tax for a *private* purpose is unconstitutional, though it pass through the hands of public officers." A tax for a private purpose, says *Lowe, J.*, in the *Case of Wapello County*, 13 Iowa, 405, is "a solecism in language." What is a *public purpose* sufficient to support the power, has been much discussed during late years, particularly in connection with the authority conferred upon municipalities to aid in the building of railways. See chap. VI. *ante*, secs. 104, 105, 106, *et seq.*

The expression *public purpose* or *public use* is not to be taken in any narrow sense, but as distinguished from *private* purpose or uses, and, therefore, the Supreme Court of Wisconsin has properly held that in the absence of special constitutional restriction, the legislature may authorize a town or other municipality to levy taxes therein, for public purposes not strictly of a municipal character, but from which the public have received or will receive some direct advantage; or where the tax is to be expended in defraying the expenses of the government, or in promoting the peace, good order and welfare of society, or in paying claims founded upon natural justice and equity, or upon gratitude for public services or expenditures, or in discharging the obligations of charity and humanity. *State ex rel. McCurdy v. Tappan, Town Clerk*, 29 Wis. 664; *Cooley Const. Lim. chap. XIV. 487, et seq.*

² *Mill Political Economy*, vol. II. pp. 370, 372; *Warren v. Henly*, 31 Iowa; S. C., West. Jurist, vol. V. p. 101, opinion of *Beck, J.*

§ 588 Whatever limitations exist upon the legislative authority to wield, in its full scope, the taxing power of the state at its will, must be sought in the nature of the power itself, as thus briefly explained, and in express or implied restrictions of the national and state constitutions.¹ Taxation implies, as we have seen, an imposition for a *public* use; and it also implies that the imposition shall be upon some system of *apportionment*, so as to secure uniformity among those who are, or ought to be, subject to the particular tax or assessment; and hence we may readily conceive of acts of the legislature demanding sacrifices of citizens which could not be sustained as legitimate exercises of the

¹ Subject to constitutional restrictions, if any there be, in the particular state, it is within the *power of the legislature* of a state to ascertain the public burdens to be borne and the persons or classes of persons who ought to bear them, and its determination is not judicially reviewable. *Ante*, chap. IV. secs. 42, 43, 45, and the authorities there cited. *People v. Mayor, &c. of Brooklyn*, 4 N. Y. (4 Comst.) 419, 1851; followed in *Brewster v. Syracuse*, 19 N. Y. 116, 118, 1859; in *Sun Insurance Company v. The Mayor, &c.*, 8 N. Y. 241, 251; in *Town of Guilford v. Supervisors, &c.*, 13 N. Y. (3 Kern.) 143; in *Litchfield v. Vernon*, 41 N. Y. 123, 1869; and in *Scovill v. Cleveland*, 1 Ohio St. 127, 135, 1853; *Warren v. Henly*, 31 Iowa, 81, *per Beck, J.*; *De Pauw v. New Albany*, 22 Ind. 204, 1864; *North Missouri Railroad Company v. Maguire*, Supreme Court of Missouri, 1872 (not yet reported).

"I admit that the power to tax is unbounded by an express limit in the constitution" of Pennsylvania; "but nevertheless taxation is bounded in its exercise by its own nature, essential characteristics and purpose." *Per Agnew, J.*, in *Washington Avenue*, 69 Pa. St. 352, 363, 1871.

The legislature, in the exercise of the taxing power, may impose a tax to build a bridge, or to pay debts incurred for one already constructed, for the public accommodation; and the legislature (in the absence of constitutional restriction upon its power) may define how large that local community shall be, that is made subject to the tax, whether the state, or a county, or a city, or one or more of its wards. *Shaw v. Dennis*, 5 Gilm. (Ill.) 416; *Philadelphia v. Field*, 58 Pa. St. 320, referred to, *ante*, sec. 43. If there be no special restriction on the legislature, it may create taxing districts without reference to existing civil or political districts. *Shelby County v. Railroad Company*, 5 Bush (Ky.) 225. *Ante*, chap. IV. *passim*. Authority to tax property *outside* of corporate limits, to pay bonds issued in aid of a railroad, sustained. *Langhorne v. Robinson*, 20 Gratt. (Va.) 661, 1871. See also *Waterville v. County*, 59 Maine, 80, 1871. But in *Wells v. City of Weston*, 23 Mo. 384, 1856, it was held that the legislature cannot constitutionally authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the limits of the corporation.

taxing power although no specific provision of the constitution should be infringed. But where the imposition is properly a tax, and no specific or express constitutional limitation exists, the power of the legislature is supreme, and without any theoretical bounds. "If the right to impose a tax exists," says the Supreme Court of the United States,¹ "it is a right which, in its nature, acknowledges no limit;" and the reason is, that the needs of the public or of the government can ordinarily have no bounds set to them. Unless, therefore, there is some limit fixed in the constitution, the state may tax the property within the state to its full value; in other words, it has unlimited power over the *rate* of taxation and the *objects* (the property subject to be taxed) of taxation.

§ 589 The power of *taxation* and the power of *eminent domain*, subject to both of which all private property is held, although they both originate in political necessity, are in their nature materially different. For taxes paid or money exacted under the taxing power, no direct specific compensation is made; but where property is *taken* under the right of eminent domain, this can be done, as we have already seen, only to the limited extent required by the particular object or enterprise in favor of which it is exercised, and then only on the condition of making to the owner direct and full compensation in money for the *particular* and *unequal* sacrifice which he would otherwise be obliged to make for the public benefit. Most of the courts have concurred in the view that the usual constitutional provision, prohibiting the taking of private property for public use without compensation, is a limitation on the exercise, by the state, of the right of eminent domain, and not a limitation on the taxing power.²

¹ *Weston v. Charleston*, 2 Pet. (U. S.) 449; *McCulloch v. Maryland*, 4 Wheat. 316, 431; *Hanson v. Vernon*, 27 Iowa, 28, 49, 1869.

² *People v. Mayor, &c. of Brooklyn*, 4 N. Y. (4 Comst.) 419, 1851. The difference between *taxation* and *eminent domain* is here discriminated with great clearness and precision in the learned opinion of Mr. Justice *Ruggles*. Adhered to and followed: *Litchfield v. Vernon*, 41 N. Y. 123, 1869. See, also, *Gilman v. Sheboygan*, 2 Black (U. S.) 510, 1862; *Moale v. Baltimore* (opening street), 5 Md. 314, 1854. *Ante*, chap. XVI on Eminent Domain;

§ 590. In the general power of the legislature, as well as in its power to create municipal corporations,¹ may be found the right to authorize them, when created, *to impose or levy local rates, taxes, or assessments* upon their inhabitants, and upon all property within the limits of the designated taxing district, which is ordinarily co-extensive with the territorial limits of the municipality.² Indeed it is one of the distinguishing features of our municipal institutions, that local rates shall be locally imposed by those who have to pay them or bear their burden; and this power, from very early periods, has, in the different states, been constantly delegated to, and exercised by, the local authorities.³

In the absence of special constitutional restriction, the legislature may *confer the taxing power upon municipalities* in such measure as it deems expedient; in other words, with such limitations as it sees fit, as to the rate of taxation, the purposes for which it is authorized, and the objects (that is, the property) which shall be subjected to taxation; but it cannot, of course, confer any greater power than the state itself possesses, and must observe the restrictions and limitations of the organic law.⁴

Hanson v. Vernon, 27 Iowa, 28, 54, 1869; Williams v. Detroit, 2 Mich. 565; Railroad Company v. Connelly, 10 Ohio St. 165.

¹ *Ante*, secs. 17, 27.

² Hope v. Deaderick, 8 Humph. (Tenn.) 1, 1847; Godden v. Crumf, 7 Leigh (Va.) 120; Bull v. Read, 13 Gratt. (Va.) 78, 98, 1855; Thompson v. Floyd, 2 Jones (North Car.) Law, 818, 816; Wilmington v. Roby, 8 Ire. (North Car.) Law, 250, 1848; Alexander v. Baltimore, 5 Gill (Md.) 883, 893, 1847, *per Martin, J.*; Burgess v. Pue, 2 *Ib.* 11; S. C., *Ib.* 254, 1844; Intendant v. Chandler, 6 Ala. 899; Estabrook v. State, *Ib.* 653; Battle v. Mobile, 9 *Ib.* 234; Bradley v. McAtee, 7 Bush (Ky.) 667; *Ib.* 599; Osborne v. Mobile, 44 Ala. 498. *Supra*, sec. 588, n.

³ "The state has an undoubted power to tax persons and property within its limits, and it may delegate such power to a civil corporation, so far as it may be necessary for the good government of the corporation." Harrison v. Vicksburg, 3 Sm. & Marsh. (Miss.) 581, *per Sharkey, C. J.*; Smith v. Aberdeen, 25 Miss. 458.

⁴ Caldwell v. Justices, &c., 4 Jones (North Car.) Eq. 323, 1858, *per Ruffin, J.*, quoted *ante*, sec. 9, note; Burgess v. Pue, above cited.

⁵ Alexander v. Baltimore, 5 Gill (Md.) 883, 893, 1847, *per Martin, J.*;

§ 591. The power of the states and their municipalities to levy taxes is subject to certain express and implied restrictions in the *Federal Constitution*, which may be here briefly mentioned. Thus states cannot, without the consent of congress, lay any *imposts or duties on imports or exports* except what may be absolutely necessary for executing their inspection laws; nor can they, without the consent of congress, lay any duty on *tonnage*, as they are expressly prohibited from so doing by the constitution.¹ Nor does the power of taxation by the states extend to the *instruments of the federal government*, nor to the *constitutional means* employed by congress to carry into execution the powers conferred in the Federal Constitution.² Taxes may be imposed by a state on all sales of merchandise or property made within the state, whether the goods sold were the produce of the state imposing the tax, or of some

Primm v. Belleville, Illinois Supreme Court, April, 1872; *North Mo. R. R. Co. v. Maguire*, 44 Mo. 490, 500, 1872. *Post*, sec. 614.

"The state cannot authorize a municipal corporation to impose a tax which she herself would have no right to levy." *O'Donnell v. Bailey*, 24 Miss. 386, 1852. A city corporation cannot tax a bank wholly owned by the state, though there be no express provision exempting the property of the bank from taxation. *Mayor v. Bank of Tennessee*, 1 Swan (Tenn.) 269. Nor can it tax the *public property* of a county situate within the limits of the municipality. *Piper v. Singer*, 4 Serg. & Rawle (Pa.) 354. Construction of special constitutional provision requiring the legislature to *restrict* the power of taxation of incorporated towns and cities. *Ante*, sec. 27. When rights of creditors are not infringed the legislature may change the power of taxation delegated to municipal corporations. *Richmond v. R. R. Co.*, 21 Gratt. 604. *Ante*, chap. IV.

¹ See *ante*, sec. 67, and cases cited.

As to passenger tax. *Smith v. Turner*, 7 How. (U. S.) 283, 1849; *Smith v. Marston*, 5 Texas, 426; *State v. Fullerton*, 7 Rob. (La.) 210, 1844; *Norris v. Boston*, 4 Met. 282; *Rabassa v. Mayor*, 1 Martin (La.) 484; 10 Am. Law Reg. (N. S.) July, 1871; *Crandall v. Nevada*, 6 Wall. 35. *Ante*, sec. 67, n. Case of state freight tax. 15 Wall. 232. State tax on railway gross receipts, 15 Wall. 284.

² *McCulloch v. Maryland*, 4 Wheat. 316, 424; *Weston v. Charleston*, 2 Pet. (U. S.) 449, 1829, reversing S. C., *Harper* (South Car.) 219; *National Bank v. Commonwealth*, 9 Wall. 353; *Osborn v. Bank of the United States*, 9 Wheat. 738; *Thompson v. Pacific Railroad*, 9 Wall. 579; *Union Pacific Railroad Company v. Lincoln County*, 1 Dillon C. C. R. 314, 1871. *Post*, sec. 615a.

other state, provided the tax imposed is *uniform*, but a tax discriminating against the commodities of the citizens of the other states of the Union would be inconsistent with the provisions of the Federal Constitution, and a law imposing such a tax would be unconstitutional and invalid.' And the Supreme Court of the United States has recently decided that an act of the legislature of Maryland levying *discriminating taxes against non-residents of the state* was void (reversing the judgment of the Court of Appeals of Maryland), because repugnant to the provision of the Federal Constitution, which guarantees to the citizens of each state all the privileges and immunities of the citizens of the several states.'

¹ Woodruff v. Parham, 8 Wall. 189; Hinson v. Lott, *Id.* 151; Ward v. Maryland, 12 Wall. 418, 1870, *per Clifford, J.*; Wiley v. Parmer, 14 Ala. 627. *Post*, sec. 615a.

² Ward v. Maryland, 12 Wall. 418, 1870; (S. C. in state court, Ward v. State, 31 Md. 279.) Giving the judgment of the court, *Clifford, J.*, observed: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the state, and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. Cooley Const. Lim. 16; Brown v. Maryland, 12 Wheat. 449. Comprehensive as the power of the states is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the constitution; and inasmuch as the constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the state might sell, or offer or expose for sale, in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents. State v. North *et al.*, 27 Mo. 464; Fire Department v. Wright, 3 E. D. Smith, 478; Paul v. Virginia, 8 Wall. 177." *Bradley, J.*, regarded the act of the Maryland legislature as being also in violation of the commerce clause of the constitution.

In sustaining the validity of a corporation tax on sales of produce within

§ 592. In this connection, it will be convenient to notice some specific *state constitutional provisions* in their bearing upon the subject of taxation and local assessments by municipal corporations. The late constitution of *Illinois* contained a provision that "The corporate authorities of * * * cities * * * may be vested with power to assess and collect taxes for corporate purposes." It was held by the Supreme Court that this provision had the effect to limit taxation by municipalities to local or corporate purposes; and also to restrict the legislature from

the limits of the city by flat-boat traders, Mr. Chief Justice *Sharkey* observes: "The ordinance imposed no tax for the privilege of introducing the article, but a tax on the amount of sales. The power of a state to tax the merchandise of its own citizens has never been questioned, nor can it be. When a citizen of Ohio comes into this state, and makes sales of his merchandise here, there can be no reason why he should be exempted from the operation of the state laws. This position, carried to its utmost extent, would defeat the power of the state over all sales of merchandise within its territory; it would only be necessary for the merchant to claim a residence in some other state, and the power of the state would be at an end." *Harrison v. Vicksburg*, 3 Sm. & Marsh. (Miss.) 581, 586, 1844.

The legislature, if it does not make discriminations in violation of the state constitution, may authorize municipal corporations to tax *transient traders or itinerant dealers and pedlars*; and such tax is not in violation of the constitution of the United States, although the property be brought from another state, provided, it must be added, it does not unlawfully discriminate in favor of the resident, and against the non-resident, citizen. *Wynne v. Wright*, 1 Dev. & Bat. (North Car.) Law, 19, 1834; *Cowles v. Brittain*, 2 Hawks (North Car.) Law & Eq. 204; *Wilmington v. Roby*, 8 Ire. (Law) 250, 1848; *Whitfield v. Longest*, 6 Ib. 268; *Plymouth v. Pettijohn*, 4 Dev. 591; *Corfield v. Coryell*, 4 Wash. C. C. 380; *State v. City Council*, 10 Rich. (South Car.) Law, 240, 1857; *State v. Pinckney*, Ib. 474; *City Council v. Ahrens*, 4 Strob. (South Car.) 241; *Keller v. State*, 11 Md. 525, 1857; *Ward v. Morris*, 4 H. & McH. (Md.) 340; *Ward v. Maryland*, 31 Md. 279; reversed, *Ward v. Maryland*, 12 Wall. 418, 1870; *Oliver v. Washington Mills*, 11 Allen, 268; *State v. North*, 27 Mo. 464; *Wiley v. Farmer*, 14 Ala. 627.

Taxation of *foreign corporations* doing business in the state permissible, though similar local corporations are not subject to the same tax. *Commonwealth v. Milton*, 12 B. Mon. 212; *Slaughter's Case*, 13 Gratt. (Va.) 767; *Tatem v. Wright*, 3 Zab. (N. J.) 429; *Paul v. Virginia*, 8 Wall. 168, 1868. A state tax upon bonds of a debtor within the state held by a person out side of the state, is unconstitutional, though secured by a mortgage of land within the state. *Case of State Tax on Foreign-held Bonds*, 15 Wall. 300, 1872.

granting the right of local or corporate taxation to any other than the corporate authorities of the municipality or place to be taxed.¹

The constitution of *Arkansas* provides that "all property shall be taxed according to its value, the manner of ascertaining which to be as the general assembly shall direct, making the same equal and uniform throughout the state. No one species of property shall be taxed higher than another species of property of equal value. The gen-

¹ Constitution of Illinois, art. 9, sec. 5; *Howard v. Drainage Company*, 51 Ill. 130; *ante*, sec. 43; *Primm v. Belleville*, Illinois Supreme Court, April, 1872. Under this provision of the constitution, it was held that a city could not be compelled to incur debts and issue its bonds without the consent of the corporate authorities. In the case of *Lincoln Park*, the commissioners were created by the legislature, and were not under the control of the corporation, and had the power to make purchases of lands for the park; and to pay for such purchases, the city was to issue to them its bonds. The court held that they were not the *corporate authorities* of the city, and refused a *mandamus* to the city authorities to issue the bonds. *People v. Chicago*, 51 Ill. 17. But where the people of the corporation accept or adopt the act, and thereby make the commissioners corporate authorities, they may be vested with the power to assess and collect taxes. *People v. Salomon*, 51 Ill. 37. See also, *Howard v. Drainage Company*, *supra*; *Livingston v. Wider*, 53 Ill. 302; *S. P. People v. Canty*, 55 Ill. 83, 1870; *Wider v. East St. Louis*, 55 Ill. 133. *Infra*, secs. 603, 616, 668, n.

In the case of the *Supervisors of Livingston County v. Wieder*, decided by the Supreme Court of Illinois, February 7, 1873 (5 *Chicago Legal News*, 265) it was held that the State Reform School was a state institution and not a county or corporate institution; that the expense of establishing it should be borne by all parts of the state equally; that an act of the legislature authorizing the creation of a municipal or corporate debt in order to secure its location or erection was unconstitutional, because such a debt (involving the necessity of a resort to taxation to pay it) is not created for a "corporate purpose" within the meaning of the constitutional provision referred to in the text. See and compare *Merrick v. Amherst*, 12 Allen, 500, where the court affirmed the power of the legislature under the constitution of Massachusetts to authorize the town of Amherst to raise \$50,000 for the Agricultural College located therein. But in *Jenkins v. Andover*, 103 Mass. 94, a statute permitting a town to tax itself for the benefit of a private incorporated academy was held invalid. See *Lowell v. Boston*, Sup. Jud. Ct. of Mass., 1873, as to validity of aid to owners of land in Boston, the buildings upon which were burned in the great fire in that city of November 9th and 10th, 1872. *Ante*, secs. 105a; 105b. *Commercial Bank v. Iola*, 2 Dillon C. C. 1873; *ante*, secs. 106-103; *Page v. Graham*, 57 Ill. 144.

eral assembly shall have power to tax merchants, hawkers, pedlars, and privileges in such manner as may be prescribed by law." Respecting the effect of these provisions, the Supreme Court, after reviewing the previous adjudications, which were not in all respects uniform, finally decided that the constitution did not prohibit the legislature "from *authorizing counties and incorporated towns* to impose a tax upon billiard tables, ten-pin alleys, taverns, groceries, and the like, for municipal purposes, and as a police regulation for the preservation of good order; that these provisions of the constitution apply to *state* revenue, and are not applicable to taxes levied for county [and city] purposes."

§ 593. The constitution of *Ohio*, in substance, requires "the taxing" by the legislature of "all property by an uniform rule;" but, as construed, this provision does not necessarily exclude the right to tax that which is *not property*, nor does it cover the whole ground included within the limits of the taxing power.¹ An "assessment" is not "taxing," within the meaning of the constitution;² nor is the exacting by a municipality of money for granting a *license for shows and exhibitions* a "taxing of property," and hence, such exaction is not unconstitutional.³ But although this constitutional provision does not apply to "assessments" it does apply to "all *taxes* either for state, county, township, or *corporation* purposes;" and it deprives the legislature of the plenary power it would otherwise have over the subject of taxation, and of the right (which it would otherwise possess) to make exceptions and exemptions. *All* property must be taxed.⁴

¹ *Washington v. State*, 18 Ark. 752, 1853.

² Constitution of Ohio, art. 12, sec. 2; *Zanesville v. Richards*, 5 Ohio St. 589, 593, 1855; *Baker v. Cincinnati*, 11 Ohio St. 534, 541, *per Gholson, J.*; *Bank v. Hines*, 8 Ohio St. 1; *Hill v. Higdon*, 5 Ohio St. 243; *Id.* 520.

³ *Reeves v. Wood County*, 8 Ohio St. 333; 9 *Id.* 520; *Northern Railroad Company v. Connelly*, 10 Ohio St. 159, and cases cited; *People v. Mayor, &c. of Brooklyn*, 4 N. Y. 419, 440.

⁴ *Baker v. Cincinnati*, 11 Ohio St. 534; correcting and qualifying report in *Mays v. Cincinnati*, 1 *Id.* 268, 273.

⁵ *Zanesville v. Richards*, 5 Ohio St. 589, 592, 1855, *per Ranney, C. J.*; *Hill v. Higdon*, *Id.* 243, 246.

§ 594. A provision in the constitution of *Louisiana* declaring that "taxation shall be *equal and uniform throughout the state*," even if it extends to municipal taxation, is not violated by a legislative provision authorizing the taxation by municipalities of callings, trades and professions exercised within their limits; and taxation of this character is "*equal and uniform*" if all persons engaged in the same business are taxed alike.¹

¹ *Merriam v. New Orleans* (billiard tables) 14 La. An. 318; *New Orleans v. Staiger*, 10 *Ib.* 68; *New Orleans v. South Bank*, 11 *Ib.* 41; *New Orleans v. Turpin* (tax on auctioneers), 18 *Ib.* 56, 1858; *Municipality v. Dubois* (special tax on livery stable keepers), 10 *Ib.* 56; *New Orleans v. Bank*, *Ib.* 735; *Benton Street Case*, 9 *Ib.* 446. *Infra*, secs. 600, 617.

Whether the "equality" and "uniformity" of taxation required by the constitution extends to municipal taxation. *Lynch v. Alexandria*, 9 La. An. 498; *Municipality, &c. v. White*, *Ib.* 446; *Cumming v. Police Jury*, *Ib.* 503. But see later case of *New Orleans v. Elliott* (paving street) 10 *Ib.* 59, and cases above cited. *Street Case*, 20 La. An. 497, 1868; *Draining Company Case*, 11 La. An. 338, 1856; *Wallace v. Shelton* (levee assessment) 14 La. An. 498; *Municipality v. Dunn*, 10 *Ib.* 57; *Same v. Guillotte*, 14 *Ib.* 207, 1859; *State v. Volkman*, 20 *Ib.* 585. It is held that the constitutional provision quoted did not prohibit the legislature from authorizing a municipal corporation to require the payment of \$500 as the price of a license for theatre exhibitions; the court putting its judgment on the ground that the exaction of a price for the license so granted was not, in the sense of the constitution, a *tax*. *Charity Hospital v. Stickney*, 2 La. An. 550, 1847; *Municipality v. Duncan*, *Ib.* 182. In *Virginia*, it is considered that the constitutional requirement of equality and uniformity does not require the taxes on all licenses to be equal and uniform. *Slaughter v. Commonwealth*, 13 Gratt. (Va.) 767; *Gilkerson v. Justices, &c.*, *Ib.* 577. Construction of provision in the constitution of *Massachusetts* requiring taxation to be "reasonable and proportional." *Merrick v. Amherst*, 12 Allen, 500. In this case it was held that the legislature might authorize a town to raise money by taxation for an agricultural college to be established therein. *Ib. Ante*, secs. 105a, 105b, 592, n. In *Pennsylvania* (whose constitution, however, contains no express provision requiring *equality* of taxation), an act of the legislature was held constitutional which compelled the property owners of the *county town* to contribute, in the way of taxes, \$500 annually for several years, over and above the usual county rates and levies, to aid in defraying the expenses of erecting a court house and jail therein, then in process of erection. *Kirby v. Shaw*, 19 Pa. St. 258, 1852. See *Schenley v. Allegheny*, 25 *Ib.* 128. Compare, *Hammett v. Philadelphia*, 65 Pa. St. 146. *Post*, sec. 619, note. As to construction of provision requiring "*the rule of taxation to be uniform*, and to be levied upon such property as the legislature shall prescribe" (constitution of *Wisconsin*, art. VIII. sec. 1). *Carter v. Dow* (dog license tax valid) 16 Wis. 298, 566; *Fire Department v. Mil-*

§ 595. Unless there be some constitutional restriction, the legislature may authorize a municipality to levy and collect *retrospective taxes*, and for this purpose use the assessment rolls of a previous year.¹

§ 596. The expense of making *local improvements*, such as grading and paving or otherwise improving streets and sidewalks, constructing drains, sewers, and the like, is very generally met, in whole or in part, by *local assessments* authorized to be made upon persons or property benefited, or supposed to be benefited. Legislation of this character, both in respect to its justice and its constitutional validity, has been extensively discussed by the judicial tribunals of perhaps nearly every State in the Union.² The courts seem

waukee (foreign insurance company tax valid), *Id.* 186; Railroad Company v. Supervisors, 3 Am. Law Reg. 679; Weeks v. Milwaukee, 10 Wis. 242, 282, State v. Portage, 12 *Id.* 562; Bond v. Kenosha, 17 *Id.* 284; Hale v. Kenosha, 29 *Id.* 599; Dean v. Gleason, 16 *Id.* 116; Brightman v. Kirner, 22 *Id.* 54. And see Gilman v. Sheboygan, 2 Black (U. S.) 210; Muscatine v. Railroad Company, 1 Dillon C. C. R. 536. Uniformity of taxation of corporations required by the Iowa constitution. Muscatine v. Railroad Company, *supra*; Davenport v. Railroad Company, 16 Iowa, 348, the opinion of Wright and Dillon, JJ., subsequently, in 1871, approved by a majority of the court; Bridge Company v. Dubuque, 32 Iowa, 427. And see Express Company v. Ellyson, 28 Iowa, 370, 380.

¹ Municipality v. Wheeler, 10 La. An. 745; New Orleans v. Poutz, 14 *Id.* 853. *Ante*, sec. 46. In Wisconsin it was held that an act passed in 1862 (made necessary to avoid difficulties growing out of previous unconstitutional taxation) providing for the re-assessment of taxes of 1854, '55, '56, and '57, in one of the cities of that state, was constitutional. Tallman v. Janesville, 17 Wis. 71, 1863. *Post*, sec. 652 and cases there cited.

² In holding that the legislature may constitutionally confer upon municipal corporations the power to improve streets at the expense of the adjoining proprietors, the Supreme Court of Missouri say: "The subject has been thoroughly discussed, and every principle bearing on it severely analyzed, in almost every state of the Union where the power has been exercised; and it is now as firmly established as any other doctrine of American law." *Per Richardson, J.*, in Palmyra v. Morton, 25 Mo. 593, 1857; see also, in the same state, Egyptian Levee Company v. Harding, 27 Mo. 495; St. Joseph v. O'Donoghue, 31 Mo. 345, 1861; Lockwood v. St. Louis, 24 Mo., 20, 1856; re-affirmed, St. Louis v. Clemens, 36 Mo. 467, 1865; Sinton v. Ashbury, 41 Cal. 525, 1871. See State v. Leffingwell, Superior Court Mo. 1873, *ante*, sec. 463, note, and see authorities cited *infra*. Parliament has the power, and for a long time has exercised it, of assessing property

to be very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. And the many cases which have been decided fully establish the general proposition that a charter or statute authorizing the municipal authorities to open or establish streets,¹ or to make local improvements of the character above mentioned, and to assess the expense upon the property which, in the opinion of the designated tribunal or officers, shall be benefited by the improvement, in proportion to the amount of such benefit, or upon the abutters in proportion to benefits or frontage or superficial contents, is, in the absence of some special constitutional restriction, a valid exercise of the power of taxation. Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the property benefited or legislatively declared to be benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, in all cases, a question of legislative expediency, unless there be some special restraining constitutional provision upon the subject.² Whatever limitation there is upon the

for benefits conferred. Viner's Abr. "Sewers;" Comyn's Dig. Sewers." The legislature may authorize the expenses of constructing sewers to be assessed upon the adjoining property. *Stroud v. Philadelphia*, 61 Pa. St. 255, 1869; *Borough, &c. v. Shortz*, *Id.* 399. The power to assess the lot owner for the expense must be given by statute. *Id.*

The constitution confers upon Congress the authority to exercise exclusive legislation over the District of Columbia, and hereunder it is competent for Congress to authorize the City of Washington to assess the expense of making local improvements in or upon streets on the abutters, and the tax for such improvements need not be a general one on the city. *Willard v. Presbury*, 14 Wall. 676, 1871.

¹ As to apportioning the damages for opening streets among the lots or property benefited, see chapter on Eminent Domain, *ante*, sec. 481, and authorities there cited. "Owner," who is. *Newark v. State*, 34 N. J. Law, 523; *Morange v. Mix*, 44 N. Y. 315.

² There has been much controversy upon the point whether it is more just that the adjacent property should bear the whole expense of sidewalks and other local improvement than that it should be borne by the corporation at large. See, for example, opinion of *Paine, J.* (*Weeks v. Milwaukee*,

power of taxation (which includes the power of apportioning taxation) must be found in the nature of the power, and in express constitutional provisions.¹

10 Wis. 258), attacking, and of *Beck, J.*, defending local assessments upon the abutters. *Warren v. Henly*, 81 Iowa, 81, 1870. See, also, *Philadelphia v. Tryon*, 85 Pa. St. 401; *Lexington v. McQuillan's Heirs*, 9 Dana (Ky.) 513; *People v. Mayor, &c. of Brooklyn*, 4 N. Y. 419. In Louisiana, the equitable, and, it seems to the author, just, rule is adopted, of compelling the owner of property to pay a portion (one-third) of the cost of improvements in front of it, and the residue to be paid by the municipality. In reference to this subject, *Slidell, C. J.*, remarked: "I must repeat my conviction that the system of paying for local improvements wholly out of the general treasury is inequitable, and will result in great extravagance, abuse, and injustice. I think the system of making particular localities, which are specially benefited, bear a special portion of the burden, is safer, and more just to the citizens at large, by whose united contributions the city treasury is supplied. What is taken out of the treasury is out of the pockets of all the proprietors." *Municipality v. Dunn*, 10 La. An. 57, 1855. See *Municipality v. White*, 9 Ib. 447. *Infra*, sec. 647.

If the charter requires the assessment to be according to *benefits received*, it is not sufficient to assess according to *frontage*, and the report of the commissioners of assessment should show that the assessment was made upon the right basis. *State v. Hudson*, 5 Dutch. (N. J.) 104 1860; *Same v. Same*, Ib. 115; *State v. Bergen*, Ib. 266. Where the charge is to be "in proportion to frontage" the amount of the whole work is to be ascertained and each lot charged in the proportion its frontage bears to that of all the lots. *Neenan v. Smith*, 50 Mo. 525, 1872; *St. Louis v. Clemens*, 49 Mo. 552. Difference between "benefits" and "frontage." *State v. Hudson, supra*; *Clapp v. Hartford*, 35 Conn. 66.

Construction of word "fronting."—Authority to pave a highway at the expense of the *fronting* thereon, does not authorize an assessment against a lot which is separated from the highway so paved, by a railway running side by side therewith, which is liable to be "fenced up at any moment." The court add: "We are unable, indeed, to see how it can be said that this lot fronts on the highway in question, when its real front is on another public highway—the railroad—forty-seven feet south of it." *Philadelphia v. Eastwick*, 35 Pa. St. 75, 1860. See, also, *Philadelphia v. Railroad Company*, 33 Ib. 41. Assessment on *corner lots* with double frontage held valid for entire extent improved. *Morrison v. Hershire*, 32 Iowa, 271, 1871.

¹ *People v. Mayor, &c. of Brooklyn*, 4 N. Y. (4 Comst.) 419, 1851, which is the leading case on this subject. See chapter on Eminent Domain, sec. 481. Speaking of the constitution of New York, in this respect, Mr. Justice *Ruggles*, in the case just cited, says: "It is not ordained (by the constitution) that taxation shall be general, so as to embrace all persons or *all* taxable property within the state, or *within any district* or territorial division of the state; nor that it shall or shall not be numerically equal, as in the case

§ 597. Upon the kindred question, whether it is competent for the legislature to require the *abutter to bear the*

of a capitation tax; nor that it must be in the ratio of the value of each man's land, or of his goods, or of both combined; nor that a tax 'must be co-extensive with the district, or upon all the property in a district which has the character of, and is known to the law as, a local sovereignty.' Nor has the constitution ordained or forbidden that a tax shall be apportioned according to the benefit which each tax-payer is supposed to receive from the object on which the tax is expended. In all of these particulars, the power of taxation (in this state) is unrestrained." 4 N. Y. 419, 427. The case of the People v. Mayor, &c. of Brooklyn, was recognized and followed in Brewster v. Syracuse, 19 N. Y. 116, 118; Guilford v. Supervisors, &c., 18 N. Y. (3 Kern.) 143; Sun Insurance Company v. Mayor, &c., 8 N. Y. 241, 251; Litchfield v. Vernon, 41 N. Y. 123, 1869; Howell v. Buffalo, 37 N. Y. 267, 1868. May be assessed against owner. Chapman v. Brooklyn, 40 N. Y. 372. *Post*, sec. 598.

Not only can the legislature authorize, but it may, in the absence of any special restriction upon its power in this respect, *compel* a municipal corporation to *lay out and improve highways or streets* within its limits, without its consent or a vote of its citizens; and for this purpose it may provide for raising the money by a sale of the bonds of the municipality, due at a future period, and to be paid by *taxation*; and if the local authorities refuse to issue the bonds, the duty may be enforced by *mandamus*. People *ex rel.* McLean v. Flagg, N. Y. Court of Appeals, 11 Am. Law Reg. (N. S.) 80. See, also, *ante*, sec. 43, and cases cited. *Post*, sec. 668, n.

In *Pennsylvania*, local assessments on the property benefited are "clearly within the competency of the legislature"—are a legitimate exercise of the taxing power—and "have been many times sustained by this court." *Per Woodward, J.*, in Philadelphia v. Tryon, 35 Pa. St. 401, 404, 1860. See, in same state, O'Connor v. Pittsburg, 6 Harris, 187; Schenley v. Allegheny, 25 Pa. St. 128, 1854. See Kirby v. Shaw, 19 Pa. St. 258, as to Pennsylvania constitution, and the absence of any provision therein requiring *equality of taxation*. Comp. Hammett v. Philadelphia, *infra*. The assessment may be *upon the abutter*, "in proportion to the distance in feet which the property may abut" on the improvement. Pittsburg v. Woods, 44 Pa. St. 113, 1862, approves People v. Mayor, &c. of Brooklyn, *supra*; Magee v. Commonwealth, 46 *Ib.* 358; Wray v. Pittsburg, 46 *Ib.* 865 (this case refers to O'Connor v. Pittsburg, *supra*, and says the charter was altered after it was decided); McGonigle v. Allegheny, 44 Pa. St. 118. May be *made a lien* upon the property benefited. McMasters v. Commonwealth, 8 Watts (Pa.) 292, 1834; Greensburg v. Young, 53 Pa. St. 280, construing charter to authorize assessment upon the abutter; Stroud v. Philadelphia, 61 Pa. St. 255; Fenelon's Petition, 7 Barr, 173.

In Philadelphia v. Tryon, above cited, Mr. Justice Woodward thus vindicates the *justice* of such assessments: "Local impositions for grading, paving, sewerage, and the like," he says, "have been many times sustained by this court, and are, in the long run, perfectly fair, for they enter into and

whole expense of the improvement in front of his particular property,—in other words, whether the abutters can be

enhance the value of the property assessed. The public, it is true, are benefited, but so is the individual, and, as an owner of urban property, he is further benefited, when, in due time, the same tax falls on his neighbor." 35 Pa. St. 401, 404, 1860. The foregoing cases in Pennsylvania should be read in the light of *Hammett v. Philadelphia*, 65 Pa. St. 146; S. C., 8 Am. Law Reg. (N. S.) 411. It is admitted, in this case, that municipalities may constitutionally be authorized to make *local* assessments to pay for *local* improvements, but it is denied that the legislature can authorize a local assessment to pay for an improvement not local, but made for the general or public benefit. Applying this principle, it was held that local assessments may be made for paving a street, but that when a street is once opened and paved, and is thus part of the highways of the city, the *repairing* of it cannot be assessed on the adjoining lots, but is part of the general duty of the corporation. The principle of *Hammett v. Philadelphia* was approved and applied in the subsequent case reported under the name of *Washington Avenue*, 69 Pa. St. 352, 1871. The power of local taxation is here fully discussed in the opinion of *Agnew, J.*, and it was held that the cost of making the road in that case (seven miles long, mainly through agricultural land) could not be constitutionally assessed on lands within specified distances of such road, and the reason given is that the improvement was one of general public benefit, and could not, therefore, be paid for by local assessments. The case is distinguished from local assessments in towns and cities on the basis of frontage to pay for streets or improvements thereon. See *post*, sec. 619, and note and extract from opinion of *Wagner, J.*, there given. *State v. Leffingwell*, Mo. Sup. Court, 1873 Compare *Lafayette v. Fowler*, 84 Ind. 140; *Williams v. Detroit*, 2 Mich. 560, 1861; *Hoyt v. East Saginaw*, 19 Mich. 39; *Municipality v. Dunn*, 10 La. An. 57, 1855, cited *infra*; *Bap. Ch. v. McAtee*, 8 Bush (Ky.) 508, 512. *Post*, sec. 608.

The legislature may, in *Massachusetts*, authorize the cost of opening, widening, and grading streets to be assessed upon the estates that will abut on the street afterwards. *Dorgan v. Boston*, 12 Allen, 223.

In *Kentucky*, local improvements at the expense of the abutters or property benefited was first decided to be constitutional, in the case of *Lexington v. McQuillan's Heirs*, 9 Dana, 514, 1840, in which the subject is discussed with great fullness and ability by *Robertson, C. J.* See, also, *Louisville v. Hyatt*, 2 B. Mon. 177. In the recent case of *Howell v. Bristol*, 8 Bush (Ky.) 493, 1871, it appeared that by the charter of Covington the city council were authorized to improve streets with Nicholson pavement or otherwise "when-ever the owners of the larger part of the front feet of ground" on the proposed improvement shall petition therefor, and not otherwise. This applied to every street in the city except a portion of Madison Street, which was the leading thoroughfare of the place, and as to a designated portion of this street the charter provided that it might be paved by the vote of all of the members of the council elect and in office, at the expense of the adjoining owners, *without any petition therefor*. This portion of Madison Street was

made to pay the cost of the improvement in front of their respective lots—(instead of having the whole expense of the

paved under an ordinance unanimously adopted as required by the charter, *without any petition from the owners*, and, it seems, against their remonstrance; and the city seeking to enforce payment for the pavement, the question of the validity of the charter distinctly arose. The Court of Appeals held that under the decision in the *McQuillan* and *Hyatt* Cases the charter was clearly constitutional except as to Madison Street; and as to that the Court held that this provision of the charter was destructive of that uniformity and approximate equality which those cases held to be essential to the validity of such taxation or assessments. See, also, as to repairing and reconstructing street with Nicholson pavement, *Baptist Church v. McAtce*, 8 Bush (Ky.) 508, 1871, distinguished from *Hammett v. Philadelphia*, *supra*; also *Covington v. Boyle*, 6 Bush, 204; *Bradley v. McAtce*, 7 Bush, 667.

A statute authorizing a municipal corporation to direct any street opened by individuals on their own lands and dedicated to the public, to be graded and made fit for travel, and to assess the whole expense thereof on them, is not in conflict with any provision of the constitution of *New Jersey*. *State v. Dean*, 8 Zab. (N. J.) 335, 1852; *Holmes v. Jersey City*, 1 Beasl. (N. J.) 264.

Power of local taxation for local purposes sustained, and the cases decided in *Virginia* on the subject, collected and referred to. *Gilkerson v. Justices*, 13 Gratt. (Va.) 577, 1856.

In *Maryland*, the Court of Appeals has declared the constitutionality of laws which impose all of the expenses or damages caused by opening a street upon those immediately benefited, instead of the community at large. *Alexander v. Baltimore*, 5 Gill (Md.) 383, 1847; followed, *Moale v. Baltimore*, 5 Md. 314, 1854. This last case expressly approves *People v. Brooklyn*, *supra*. See, also, *Howard v. The Church*, 18 Md. 451.

In *Mississippi*, it is also held that there is nothing in the constitution of that state which deprives the legislature of the power to impose a tax on a local district for the construction of local public improvements; and that municipal corporations may be constitutionally authorized to assess taxes upon lots for the purpose of making improvements upon the streets in front thereof. *Williams v. Cammack*, 27 Miss. (5 Cush.) 209, 224, 1854 (levee tax); following *People v. Mayor, &c. of Brooklyn*, *supra*. *S. P. Alcorn v. Horner* (levee tax), 38 Miss. 652, 1860; *Smith v. Aberdeen*, 25 Miss. 458, 1853. The objection that such a tax is not *equal and uniform*, the court considered not to be well taken.

In *Ohio*, lot owners may be constitutionally required to drain and fill up their lots, and the power may be delegated to the municipal authorities. Legislation of this character is sustained as a legitimate exercise of the police power for the preservation of the public health. *Bliss v. Kraus*, 16 Ohio St. 54, 1864. As to *local assessments*. *Creighton v. Scott*, 14 Ohio St. 438; *Scoville v. Cleveland*, 1 Ohio St. 126, 1853; *Cleveland v. Wick*, 18 Ohio St. 303; *Bliss v. Kraus*, 16 Ohio St. 54, 1864.

improvement assessed or apportioned among all, on the basis of frontage, or of benefits), there has been more diversity of opinion. In a case in Michigan involving this precise inquiry, the four judges then constituting the Supreme Court were equally divided in judgment.¹ In Wisconsin'

In *South Carolina*, municipal corporations may constitutionally be authorized to levy taxes or assessments for the purposes of drains and pavements, and without the intervention of a jury. *Cruikshanks v. City Council*, 1 McCord (South Car.) 360, 1821.

That the legislature possesses the power, unless specially restrained, to require abutters or owners of property specially benefited to construct sidewalks or other local improvements, has also been decided in the following cases. *White v. Mayor*, 2 Swan (Tenn.) 364, 1852; *Mayberry v. Franklin*, 6 Humph. 368; *Washington v. Mayor, &c.*, 1 Swan (Tenn.) 177; *Warren v. Henly*, 31 Iowa, 31, 1870; *S. C.*, 5 West Jurist, 101; *McGehee v. Mathis* (levee tax), 21 Ark. 40, 1860; *Nichols v. Bridgeport*, 28 Conn. 189, 207, approving *People v. Mayor, &c. of Brooklyn*, *supra*. *S. P. Cone v. Hartford*, 28 Conn. 363, 374; *State v. Portage*, 12 Wis. 563; *Indianapolis v. Mansur*, 15 Ind. 112; *Lafayette v. Fowler*, 34 Ind. 140; *Blanding v. Burr*, 13 Cal. 343; *Street Railway Appeal*, 32 Cal. 499; *Allen v. Drew*, 44 Vt. 174, 1872; *Sinton v. Ashbury*, 41 Cal. 525, 1871. Assessments on adjoining lots, for paving, held constitutional in the Detroit charter. *Williams v. Detroit*, 2 Mich. 560, 1853. See *Woodbridge v. Detroit*, 8 Mich. 274; *Hoyt v. East Saginaw*, 19 Mich. 39.

As to power to pave street occupied by a *plank road company* under legislative authority, and assess the amount upon the abutters. *Bagg v. Detroit*, 5 Mich. 336. *Turnpike road*: *State v. New Brunswick*, 1 Vroom (N. J.) 395 (a grading and paving assessment). Local assessment on *railroad property*. *Railroad Company v. Connelly*, 10 Ohio St. 159; *Railroad Company v. Spearman*, 12 Iowa, 112; *State v. Atlantic City*, 34 N. J. Law, 99. *Supra*, sec. 537, n.

¹ *Woodbridge v. Detroit*, 8 Mich. 274, 1860, *Martin, C. J.*, and *Manning, J.*, holding that the provision of the charter of Detroit authorizing the council to cause streets to be improved, and to assess the whole expense in front of each lot upon the lot, and make the same a lien thereon, was valid. *Campbell and Christianity, JJ.*, *contra*. The discussions in the several opinions of the judges are very interesting and instructive. Mr. Justice *Cooley*, in his treatise, expresses a decided opinion against the constitutionality of such enactment, his ground of objection being that the requirement is arbitrary, and disregards the principles of uniformity and apportionment of burden. *Cooley Const. Lim.* 508. See on general subject of constitutional power, *Hoyt v. East Saginaw*, 19 Mich. 39.

² *Weeks v. Milwaukee*, 10 Wis. 258. *Paine, J.*, makes a strong argument against all local assessments on principle, but considers the right to make them as recognized by the constitution of the state, which requires the

and in Iowa¹ the power of the legislature, in the absence of special restriction, to require local improvements to be made in this manner has been expressly adjudged, and in some, and perhaps most, of the other states the power has been conferred, and seems to have been exercised without being judicially questioned. It may be true that in some instances more hardship will be occasioned by requiring each owner to make or pay for the improvement in front of his own property, than if the cost were assessed on the basis of frontage or of supposed benefits received, still it seems to the author difficult to find satisfactory and solid grounds on which to discriminate the cases so as to hold that one is within the constitutional power of the legislature and the other is not.

§ 598. Whether the *constitutions* of the various states *do contain provisions which prohibit the legislature* from assessing the expense of local improvements upon the property in the vicinity has given rise to numerous decisions. In the leading case it was held, upon great consideration, in an opinion the reasoning and conclusion in which have been almost everywhere admitted to be sound, that legislation of this character did not contravene the constitutional provision that "no person shall be deprived of life, liberty, or *property*, without due process of law; nor shall *private property* be taken for public use without just compensation."

§ 599. The constitution of *California* requires that "*taxation* shall be *equal and uniform* throughout the state, and that "and that all property in the state shall be *taxed in proportion to its value*." The word *taxation*, as

legislature, in organizing municipal corporations, "to restrict their power of taxation, *assessment*," &c. See *ante*, sec. 27.

¹ Warren v. Henly, 81 Iowa, 81; S. C., 5 Western Jurist, 101, 1870. In this case a provision of the charter of the city of Lyons, authorizing the city council to cause the streets to be paved and the pavement repaired, and to that end to require the adjacent owners to pave or repair one-half in width of the street contiguous to their respective lots, and in case of neglect, authorizing the city to do the work and assess the expense as a tax on the lots, was held not to be unconstitutional.

² People v. Mayor, &c. of Brooklyn, 4 N. Y. (4 Comst.) 419, 1851.

mere used, was held, by the Supreme Court of that state, to refer to general taxes to defray the ordinary expenses of the state and its subordinate local governments, and not to assessments for local improvements; that *taxation* was intended to be exercised upon the basis of value, so as to secure equality and uniformity; that *assessments* (although a branch of the taxing power) need not necessarily be exercised on the *ad valorem* principle, but the legislature is at liberty to adopt a different mode or basis of apportionment, such as frontage, benefits received, or superficial contents.¹

¹ Constitution of California, art. 11, sec. 13; *Emery v. Gas Company*, 28 Cal. 345, 1865. The opinion of *Sawyer, J.*, contains an exceedingly clear and able discussion of the subject, in the light of the adjudged cases. See, also, *Hart v. Gaven*, 12 Cal. 476; *Argenti v. San Francisco*, 16 Cal. 255; *People v. Railroad Co.*, 35 Cal. 606; *Burnett v. Sacramento*, 12 Cal. 76, 1859; *Blanding v. Burr*, 13 Cal. 343; *Walsh v. Matthews*, 29 Cal. 123; *Chambers v. Satterlee*, 40 Cal. 497, 1871; *People v. Whyler*, 41 Cal. 351, 1871. Compare *Creighton v. Manson*, 27 Cal. 613. "Uniformity" of assessment, and mode of ascertaining benefits. *Street Railway Appeal*, 32 Cal. 499, 1867. Right to assess street railway company as one of the parties benefited by local improvement. *Ib.*; *State v. Newark*, 8 Dutch. (N. J.) 186; *Taylor v. Palmer*, 31 Cal. 240, 1866, as to making assessments a personal charge.

The constitutional provision mentioned in the text further construed. *People v. Railroad Company*, 35 Cal. 606; *People v. McCreery*, 34 Cal. 43. In the case last cited it is held that the power of the legislature over the whole subject of taxation, including the property to be charged, the amount of the tax, the mode of levying, assessing, and collecting it, etc., is as ample as over any other matter that is a proper subject of legislative action. The provisions of section thirteen, article 11 of the constitution are limitations, and not grants of power; but as limitations, are, according to their terms, mandatory upon the legislature. And it is also held: first, that by the words "all property in this state" is meant all private property, or all property, other than that belonging to the United States or this state, or that which is public property; second, that the words "taxation shall be equal and uniform throughout the state," relate to taxation of property, and that the legislature has no power to exempt any private property in this state from taxation; and third, that the rate of taxation on property for state purposes shall be uniform throughout the state. *People v. Coleman*, 4 Cal. 46, and *High v. Shoemaker*, 22 Cal. 368, so far as in conflict herewith, are overruled. And see *Beals v. Amador County*, 35 Cal. 624; *Chambers v. Satterlee*, 40 Cal. 497, 1871. As to uniformity in wharfage and dockage duties. *People v. Railroad Company*, 35 Cal. 606. A tax on merchants graduated according to the amount of their sales is not unequal. *Sacramento v. Crocker*, 16 Cal. 119. A charge imposed on *all* the property, personal as well as real, of a designated district to construct *loaves* therein is

§ 600. So in *Louisiana*, according to the later, if not the earlier, cases, local municipal assessments for local improvements are valid, although the constitution provides that all *taxation* shall be equal and uniform throughout the state: such assessments are not *taxation* within the meaning of the constitution requiring uniformity of taxation.'

§ 601. So, in *Missouri*, assessments against adjacent owners for benefits received from the opening, &c., of streets are a valid exercise of the taxing power, and do not contravene the provision of the constitution "that all property subject to taxation shall be taxed in proportion to its value."

§ 602. So a provision of the constitution of *Kansas*, under the title "Finance and Taxation," that "the legislature shall provide for a uniform and equal rate of *assessment* and taxation," and another section, under the title "Corporations," that "Provision shall be made by general law for the organization of cities, towns, and villages, and their power of taxation, *assessment*, &c., shall be so restricted as to prevent the abuse of such power," were held not to deprive the legislature of the power to authorize local improvements of streets to be charged upon the adjacent property. In the latter section, the word "*assessment*" was construed to be used in its technical sense of a charge

a *tax* and not an *assessment*, and is not invalid because it is not equal and uniform. *People v. Whyler*, 41 Cal. 351, 1871.

¹ *Street Case*, 20 La. An. 497, 1868, approving *Draining Company Case*, 11 La. An. 338, 1856, in which the power of the legislature to compel proprietors to make or pay for local improvements is considerably and fully examined, and it was even held by the majority of the court, that the legislature had the power to cause lands within the limits of a municipal corporation to be drained at the expense of the land benefited, through the intervention of a private corporation created for that purpose. See, also, *Wallace v. Shelton*, 14 La. An. 498 (levee assessments); *Municipality v. Dunn*, 10 La. An. 57; *O'Leary v. Sloo*, 7 La. An. 25; *Municipality v. Guillette*, 14 *Id.* 297, 1859; *Yeatman v. Crandall*, 11 *Id.* 220 (levee assessments); *Compare Municipality v. White*, 9 *Id.* 446, 1864. *Supra*, sec. 594.

² *Garrett v. St. Louis*, 25 Mo. 505, 1857, approving *People v. Mayor of Brooklyn*, *supra*; *Lexington v. McQuillan's Heirs*, 9 Dana (Ky.) 513.

upon the adjacent property for improvements, and in the former section it was used in a different sense.¹

§ 603. A legislative enactment in *Kentucky* incorporated a small suburban community, in the vicinity of a city, called "The District of Highlands," and authorized its trustees "to grade and pave, or macadamize with rock or gravel, any public road passing through or into said district, within the limits thereof; and, with the assent of two-thirds of the owners of the real estate through which any such road may pass, to levy special taxes on such real estate, to pay for such grading and paving or macadamizing." It was held that the act was constitutional, and that a levy of a tax, upon petition of the requisite number of land owners, on the land abutting the roads improved, rated by the number of acres of each owner's tract, approached equality as nearly as specific taxation might be expected to do, and hence could not be adjudged unconstitutional for unjust inequality.²

But, on the other hand, it should be stated that, in *Illinois*, it was held, under the special provisions of the late constitution, that special assessments made upon the sole basis of frontage were unconstitutional, as containing neither the element of "uniformity" nor "equality," which were regarded as essential to all taxation in that state, whether general or local.³

¹ *Hines v. Leavenworth*, 8 Kansas, 186, 1865. *Ante*, sec. 27. *Infra*, sec. 617.

² *Malchus v. Highlands*, 4 Bush (Ky.) 547. See *supra*, sec. 596, n

³ *Chicago v. Larned*, 84 Ill. 203, 1864, criticising and holding inapplicable, *People v. Brooklyn*, *supra*, and the decisions in other states which follow it. *S. P. Ottawa v. Spencer*, 86 Ill. 211, 1866. In view of the importance of the subject, and the undoubted fact that the reasoning of the court is opposed, as it would seem, to the general current of the decisions elsewhere, the special provision of the constitution, and the result reached, may be properly stated with some fulness. The constitution (art. 9, sec. 2) declared that the general assembly shall provide for levying a tax by valuation, so that all persons shall pay a tax in proportion to the value of their property. It also contained the following provision (art. 9, sec. 5): "That the corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate

§ 604. In a previous chapter the subject of municipal authority over streets, and also over roads and highways within the corporate limits of municipalities, has been considered.¹ Special provision for *road or street labor* is not unfrequently made in charters; and unless there be some restrictive constitutional provision, the legislature may empower the municipal authorities to require the inhabitants to pay road taxes, or perform road labor, which is in effect a tax. Not only so, but the legislature has the constitutional power to authorize a city corporation to levy taxes or expend money to improve public roads outside of, but leading into, the city.² And the grant in the charter of

purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." Also, the usual provision for compensation for private property taken for public use. By the revised charter of the city of Chicago it was empowered to grade, pave, and improve its streets, and to *assess the cost upon the real estate fronting on the contemplated improvement*. In the case of *Chicago v. Larned*, 84 Ill. 203, 1864, the question of the constitutionality of this part of the charter arose, and was discussed by counsel with great analytic power and research. The opinion of the Supreme Court was, that the provisions of the constitution were peculiar and more stringent than those in any other state (but in this respect, the court was probably mistaken); that the principles of "uniformity" and "equality" of taxation applied to local as well as general taxes—applied to special assessments as well as to taxes—and that a special assessment for a "Nicholson pavement," made on the basis of the *frontage* of lots on the streets, was invalid, as being neither equal nor uniform. The court was of opinion that such assessments could only be made by assessing to each lot the special benefits it will derive from the improvement, charging such benefit on the lots, the residue of the cost to be paid by equal and uniform taxation. The prior decisions in that state upon the subject are reviewed, and in effect, as it would seem to the author, overruled. In *Ottawa v. Spencer*, 40 Ill. 211, 1866, the same principle was adhered to and applied to a special assessment for building sidewalks. *S. P. St. John v. East St. Louis*, 50 Ill. 92, 1869. See *Dunnovan v. Green*, 57 Ill. 80; *People v. Cnty.*, 55 Ill. 33; *Wider v. East St. Louis*, 55 Ill. 133; *Supervisors v. Weider*, Ill. Sup. Ct., February, 1873, 5 Ch. Leg. News, 265. As to provisions of the new constitution of Illinois, and construction of sec. 4, art. IX. thereof, in relation to municipal taxes and assessments, see *Webster v. Chicago*, 1872, 4 Chicago Legal News, 116, not yet officially reported. *Prim v. Belleville*, *Id.* 227.

¹ *Ante*, chap. XVIII. secs. 534–537.

² *Skinner v. Hutton*, 83 Mo. 244, 1862. The legislature of the state has the power, unless expressly restrained by the constitution, to authorize a

a city of the power to require road labor from all male residents between certain ages is not an infringement of the provision of the State constitution, which requires "that the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of his property," the court being of the opinion that this clause was intended to direct a uniform mode of taxing property, but not to deprive the legislature of the power to resort to other species of taxation if it saw fit to do so.¹ Power to the corporate authorities of a town "to make such rules, orders, regulations, and ordinances as to them shall seem meet for repairing streets," was held, in view of the general legislation on the same subject, to give authority to require the inhabitants compulsorily to labor on the streets for the purpose of repairing them, and this, although there was also express power (regarded by the court as cumulative), to levy a tax to be expended, among other purposes, for street repairs.²

§ 605. It is a principle universally declared and admitted, that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the *power be plainly and unmistakably conferred*. It has, indeed, often been said that it must be specifically granted *in terms*; but all courts agree that the authority must be given either in express words, or by necessary implication, and that it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor deduced from any consideration of convenience or advantage. It is important to bear in mind that the authority to municipalities to impose burdens of any character upon persons or property is wholly statutory, and as its exercise may result in a divestiture and transfer of property, it must be clearly given and strictly pursued.

municipal corporation to levy a tax upon, or require a license from, persons using the paved streets of a city, for the purpose of keeping the same in repair. *Chess v. Birmingham*, 1 Grant (Pa.) Cas. 438, 1857. See *Bennett v. Birmingham*, 31 Pa. St. 15, 1850. *Ante*, sec. 540. *Infra*, sec. 631.

¹ *Sawyer v. Alton*, 8 Scam. (Ill.) 180.

² *State v. Halifax*, 4 Dev. Law (N. C.) 345, 1833.

This rule applies, as we have already seen, to proceedings¹ by municipal corporations under the delegated right of Eminent Domain, and it extends equally to proceedings under the taxing power, including special assessments for local improvements.²

§ 606. Therefore, the *power to tax* (using the word in its strict and proper sense, as a means of raising municipal

¹ *Ante*, chap. XVI. sec. 470, *et seq.*

² *Sharp v. Spicer*, 4 Hill (N. Y.) 76, 1843; *Sharp v. Johnson*, *Id.* 92; *Mays v. Cincinnati*, 1 Ohio St. 268, 1853; *Beatty v. Knowles*, 4 Pet. (U. S.) 152; *Dyckman v. Mayor, &c. of New York*, 1 Seld. 434; *Leavenworth v. Norton*, 1 Kansas, 432, 1863; *Burnes v. Atchison*, 2 *Id.* 454; *Henry v. Chester*, 15 Vt. 460, 1843, nature of authority discussed by *Redfield, J.* *Asheville v. Means*, 7 Ire. Law, 406, 1847; *Jonas v. Cincinnati*, 18 Ohio, 318, 1849; *Navigation Company v. Portland*, 2 Ore. 81; *Trustees v. Osborne*, 9 Ind. 458, 1857; *Howell v. Buffalo*, 15 N. Y. 512; *Burnett v. Buffalo*, 17 N. Y. 383; *Maurice v. Mayor of New York*, 8 N. Y. 120; *Fairfield v. Ratcliff*, 20 Iowa, 396, 1866; *Henderson v. Baltimore*, 8 Md. 352, 1855; *Rathbun v. Acker*, 18 Barb. 393; *State v. Jersey City*, 2 Dutch. (N. J.) 444; 1 *Id.* 309; *Columbia v. Hunt*, 5 Rich. (S. C.) Law, 550; *Chicago v. Wright*, 32 Ill. 192; *Taylor v. Douner*, 31 Cal. 480; *Emery v. Gas Company*, 28 Cal. 345; *St. Louis v. McLaughlin*, 49 Mo. 559, 1872; *Dwarris on Statutes*, 749.

"The burden is upon the corporation to show the grant [to lay taxes] by express words, or necessary implication. For otherwise it cannot be justified in the exercise of this high prerogative of sovereignty." *Per Lumpkin, J.*, in *Savannah v. Hartridge*, 8 Ga. 23-26, 1850. Statutes authorizing the levying of taxes are strictly construed, and if there is much doubt, that doubt exempts the citizen from the burden. *Id.* *Lot v. Ross*, 38 Ala. 156, 161, 1861. "The law [authorizing local assessments] must be strictly followed as to all its substantial requirements." *Per Lawrence, J.*, *Scammon v. Chicago*, 40 Ill. 146. "Possessing, as these municipal corporations do, the power of assessment and sale of private property, often wielded by the indiscreet and selfish, the grossest abuses would inevitably follow, if they were not held strictly within the powers granted and the means prescribed for the execution of these powers." *Per Stuart, J.*, *Kyle v. Malin* (relating to power to tax for local improvement), 8 Ind. 34-37, 1856. "It is undoubtedly true, as held by this court in the *City of Richmond v. Daniel*, 14 Gratt 887, that laws conferring the power of taxation upon a municipal corporation are to be construed strictly; and so, too, are exemptions from taxation to be construed strictly, and when the power of taxation has been once conferred, it is not to be crippled or destroyed by strained interpretation of subsequent laws." *Per Joynes, J.*, *Railroad Company v. Alexandria*, 17 Gratt. (Va.) 176, 1867. Tax levied by *de facto* aldermen valid. *Dean v. Gleason*, 16 Wis. 1-17, 1862. *Ante*, chap. IX sec. 214.

revenue) *cannot be inferred* from the general welfare clause in a charter ;¹ nor is it usually to be implied from authority to license and regulate specified avocations ;² nor from legislative authority permitting certain improvements to be made, or liabilities to be created, unless such appears on the whole to have been the clear legislative intent.³

§ 607. So, conformably to the *principles adopted for the construction* of this class of powers, it is held that where a statute specifies certain purposes for which taxes may be levied by the municipal authorities, and adds "or for any other purpose they may deem necessary," these general words will authorize taxation only for purposes of the same general character with those already enumerated.⁴ So, power "to levy and collect a special tax" for lighting a city does not authorize the council to add to the tax a percentage for collector's fees nor the cost of proceedings before the mayor; these services must be paid for from the general revenue, unless otherwise specifically provided for

¹ *Ante*, secs. 291-299; *Mays v. Cincinnati*, 1 Ohio St. 268, 1853. If the objects or subjects of taxation are expressly designated, the right to tax for other objects or subjects cannot be derived from the general power, though expressly conferred, to enact by-laws for the good government of the town. *Asheville v. Means*, 7 Ire. Law, 406, 1847.

² *Ante*, chapter on Ordinances, secs. 219-299, 331. And see *Mays v. Cincinnati*, *supra*; *Cincinnati v. Bryson*, 15 Ohio, 625, 1846, approving *Boston v. Schaffer*, 9 Pick. 419. Compare *Cincinnati v. Buckingham*, 10 Ohio, 261, and 1 Ohio St. 268-274, as to correctness of which *quære*; *Mayor v. Yuille*, 3 Ala. (N. S.) 137; *Collins v. Louisville*, 3 B. Mon. (Ky.) 133; *State v. Roberts*, 11 Gill & Johns. (Md.) 506, *per Archer, J.*; *Mayor v. Beasley*, 1 Humph. (Tenn.) 240. *Infra*, sec. 609.

³ *Leavenworth v. Norton*, 1 Kansas, 432, 1863; *Burnes v. Atchison*, 2 Id. 454. *Ante*, sec. 107, and cases cited. The power to make an improvement does not imply or carry with it, the power to levy a special assessment upon property benefited to pay for the improvement. Such assessments can only be made where the power to do so is plainly conferred and strictly followed. *Wright v. Chicago* (assessments for deepening river), 20 Ill. 252, 1858; *Columbia v. Hunt* (curbing assessment), 5 Rich. (South Car.) 550; *Chicago v. Wright*, 32 Ill. 192; *Annapolis v. Harwood*, 32 Md. 471, 1870. Power "to regulate and improve sidewalks" does not authorize special assessments upon adjoining owner; but such improvements may be paid for out of the corporation treasury. *Fairfield v. Ratcliff*, 20 Iowa, 396.

⁴ *Drake v. Phillips*, 40 Ill. 388, 1866.

by the charter.' So, power to make such by-laws as shall be necessary "to promote the peace, good order, benefit, and advantage" of the corporation, and to assess such taxes as shall be necessary for carrying the same into effect, does not authorize a tax for the payment of part of the expense to be incurred by a railroad company, in bringing the line of their road nearer to the town than originally located.'

§ 608. The *power to levy taxes and make local assessments* conferred upon municipal corporations may, in the absence of constitutional restriction, and when the rights of creditors are not impaired, as we have heretofore shown, *be changed at the pleasure of the legislature,*' or resumed and be exercised by commissioners directly appointed by the legislature.'

§ 609. The taxing power is to be distinguished from the *police power*, the general nature of which has been before adverted to.' The power to license and regulate particular branches of business or matters is usually a police power; but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes.' The authority to license and regulate various

¹ *Jonas v. Cincinnati*, 18 Ohio, 318-323, 1849; *Nelson v. La Porte*, 33 Ind. 258. Same principle as to local assessments: *Buckwall v. Story*, 36 Cal. 67; *Williams v. Detroit*, 2 Mich. 560. *Ante*, sec. 468, n. An enactment that *no costs* shall be recovered against a city in suits properly commenced against it was held unconstitutional. *Durkee v. Janesville*, 28 Wis. 464, 1871.

² *McDermond v. Kennedy*, Bright. (Pa.) 332. *Ante*, chap. VI. secs. 106-108.

³ *Ante*, chap. IV. sec. 32, note; secs. 34, 35, 36, 39, 41, and 44. *Ante*, chap. XIV.; *Blanding v. Burr*, 18 Cal. 348; *Aspinwall v. County of Jo Daviess*, 22 How. 364; *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *Lansing v. County Treasurer*, 1 Dillon C. C. 522; *Muscatine v. Railroad Company*, *Id.* 536; *Von Hoffman v. Quincy*, 4 Wall. 535; *Butz v. Muscatine*, 8 Wall. 575. *Ante*, sec. 588, n.

⁴ *Baltimore v. Board of Police*, 15 Md. 376, 1859. See on this subject, chap. IV. *ante*; *Philadelphia v. Field*, 58 Pa. St. 320, 1868. *Ante*, sec. 43.

⁵ *Ante*, chap. VI. sec. 93. The distinction between the two powers is well stated by *Depue, J.*; *State v. Hoboken*, cited *infra*. *Supra*, sec. 607.

⁶ *Ante*, chap. XII. secs. 291-299; *Ward v. Maryland*, 12 Wall. 418, 1870. *per Clifford, J.* *Ante*, sec. 79.

matters is very generally conferred upon the municipal councils, and there is, as we have seen in a former chapter, some difference of judicial opinion as to the extent of power thus conferred, particularly in reference to using it for purposes of revenue.¹ Ordinarily, the mere power to license, or to subject to police regulations, does not give the power to tax distinctly for revenue purposes; but it may give the power when such appears from the nature of the subject matter, and upon the whole charter or enactment to have been the legislative intent, but not otherwise.²

§ 610. As the authority to levy taxes or to make local assessments does not, as we have just see, exist unless unequivocally conferred, so it can be exercised no *further than it is clearly given*; and if the *mode* in which the authority shall be exercised is prescribed, *that mode must be pursued*.³ There is, however, some difficulty at times to

¹ *Ante*, chap. XII. secs. 291-299, and cases there cited.

² *Ib.* See, also, *ante*, sec. 79; *Frecholders v. Barber*, 2 Halst. (N. J.) 64. Power to license inns gives no power to tax. *Ib.* Same principle, *Kip v. Patterson*, 2 Dutch. (N. J.) 298; *New York v. Avenue Railroad Company*, 32 N. Y. 261; *St. Louis v. Boatm. Ins. Co.* 47 Mo. 150, 163; *Commonwealth v. Markham* (dog ordinance) 7 Bush (Ky.) 486. *Ante*, chap. XII. Thus, agreeably to the rule stated in the text, it was held in the *State v. Hoboken*, 33 N. J. Law, 280, 1869, that the power given to a municipal corporation to regulate streets and the building of vaults will not authorize an exaction or assessment which amounts to a tax upon the owners of lots for permission to build vaults in the streets in front of their property, or to improve the streets for their more convenient use. *Supra*, sec. 606.

Power to license *vending of intoxicating liquors* within a short distance of the municipality valid as a police regulation. *Falmouth v. Watson*, 5 Bush (Ky.) 660, 1869; *Mason v. Lancaster*, 4 *Ib.* 406. Where, by its charter, a city is authorized to assess a tax on licenses to do certain kinds of business, it may require the *payment* of the tax as a *condition precedent* to issuing the license. *Sights v. Yarnalls*, 12 Gratt. (Va.) 292, 1855.

³ *Ante*, sec. 55, and note; *D'Antignac v. Augusta*, 31 Ga. 700; *Lott v. Ross*, 38 Ala. 156, 1861; *Fitch v. Pinckard*, 4 Scam. (Ill.) 78; *Henderson v. Baltimore*, 8 Md. 852, 1855; *Rathbun v. Acker*, 18 Barb. 398; *Chicago v. Wright*, 32 Ill. 192; *Crane v. Janesville*, 20 Wis. 305; *Knox v. Peterson*, 21 Wis. 247; *Collins v. Louisville*, 2 B. Mon. 134; *Cross v. Morristown* (mode), 18 N. J. Eq. 805, 1867; *Bouldin v. Baltimore*, 15 Md. 18, 1859; *Dwarris on Statutes*, 749; *Columbus v. Storey*, 35 Ind. 97, 1870. Under the special act in question in the case it was held fatal to a special assessment that the commissioners did not take the *oath* required by statute; and it was also

distinguish provisions which are imperative from those which are directory merely.¹ It is not unusual, in the organic acts of municipalities, for the protection of the citizens, to *limit the rate of taxation*, or the amount of taxes that may be raised during any one year; and where the power is thus limited, it is not ordinarily enlarged by implication, by other provisions of the charter, general in their nature, conferring the power to make contracts, or to incur liabilities, or even giving authority to make improvements, or to erect usual or ordinary buildings.² But *special authority* to borrow money for a designated purpose may, and

held fatal that the commissioners did not, in fact, have any *meeting* at a public place at the time named in the notice of the assessment. *Wheeler v. Chicago*, 57 Ill. 415.

All the steps required by law to *confer jurisdiction* to order improvement must be complied with. *Matter of Eager*, 46 N. Y. 100; *Hewes v. Reis*, 40 Cal. 255; *Himmelman v. Danos*, 35 Cal. 441; *Dougherty v. Hitchcock*, *Id.* 512; *Nicholson Paving Company v. Painter*, *Id.* 699; *Himmelman v. Oliver*, 34 *Id.* 246; *Lexington v. Headley*, 5 Bush (Ky.) 508; *Welker v. Potter*, 12 Ohio St. 85. Where *mode* of making improvements is prescribed by statute, "*the mode in such cases constitutes the measure of power.*" *Field*, C. J., in *Zottman's Case*, 20 Cal. 102; approved by *Sanderson*, J., in *Nicholson Paving Company v. Painter*, 35 Cal. 699. Where the organic law of a city is silent as to the manner in which it shall express its determination to improve a street, this may be done by motion or resolution as well as by ordinance. *Indianapolis v. Imberry*, 17 Ind. 175, 1865. *Ante*, secs. 228, 247. *Terre Haute v. Turner*, 36 Ind. 522; *Delphi v. Evans*, 36 Ind. 90, 1871.

¹ A statute requiring a tax to be levied on a day named held directory, and the duty may be performed within a reasonable time thereafter. *Gearhart v. Dixon*, 1 Pa. St. 224, 1845. But in *Williamsport v. Kent*, 14 Ind. 306, 1860, an incorporating statute provided that "the board of trustees shall, *before* the third Tuesday in May, each year, determine the amount of general tax for the current year," and although it was not expressly declared by the statute that they should not exercise the power after the time named, it was nevertheless decided that a tax levied after the third Tuesday in May was void. *Sed quare*. *Post*, chap. XX. Description of the improvement. *Steckert v. East Saginaw*, 22 Mich. 104. Provision as to assessment roll held mandatory. *Id.*

² *Benoist v. St. Louis*, 19 Mo. 179, 1853; *Clark v. Davenport*, 14 Iowa, 494; *Larned v. Burlington*, 2 Am. Law Reg. (N. S.) 394, and note; *Leavenworth v. Norton*, 1 Kansas, 422; *Burnes v. Atchison*, 2 Kansas, 454. But see *Commonwealth v. Pittsburg*, 34 Pa. St. 496; *Amey v. Allegheny City*, 24 How. (U. S.) 364; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Butz v. Muscatine*, 8 Wall. 575, 1869. *Ante*, sec. 107.

if such be the legislative intention will, impliedly repeal, *pro tanto*, existing charter limitations upon the rate of taxation.' Where the charter limit as to the amount of taxes or rate of taxation for any given year is not exceeded, there may be *different levies of taxes* in the same year, which, where the charter is silent on the point, may be either a fiscal year or calendar year, in the discretion of the council.'

§ 611. The *general statutes of every state* contain elaborate *revenue laws*, declaring what property is taxable and in what manner it shall be taxed; but municipalities, as we have seen, must have a specific and clear grant of power to authorize *them* to levy and collect taxes, and the manner in which it is conferred often leaves it to be determined by judicial construction *how far the provisions of the general law apply to municipal corporations*. The ordinary principles of construction, where there is a conflict between the general and special legislation, have been referred to in a previous chapter.¹ In some instances, municipal charters have been held to authorize the corporations to tax in a different mode, or upon different principles, from that adopted by the legislature in respect to state taxation.'

¹ *Ante*, sec. 107, and cases there cited. In the *Commonwealth v. Pittsburgh*, above cited, a city, by a special act of the legislature, was authorized to create a large debt for a particular purpose, and to borrow money therefor, and to make provision for the payment thereof by the assessment and collection of such tax as might be necessary therefor; this was held, as respects the particular debt thus created, to be a repeal of any pre-existing restrictions upon the power of taxation.

² *Benoist v. St. Louis*, 19 Mo. 179, 1873. But, in the aggregate, the charter limit must not be exceeded. *Ib.* Where there is no restriction in the charter as to the time or amount of levy, the city council, on ascertaining that the first levy will prove insufficient, may levy an additional tax during the same year. *Municipality v. Cotton Press Company*, 6 Rob. (La.) 411.

³ *Ante*, chap. V. sec. 54, and cases cited. *State v. Branin*, 3 Zab. (N. J.) 484, 1852.

⁴ *Adams v. Mayor*, 2 Head (Tenn.) 363; *Mayor v. Bailey*, 1 Humph. (Tenn.) 232, 240; *Shoalwater v. Armstrong*, 9 *Ib.* 217; *Gless v. White*, 5 Sneed (Tenn.) 475. *Instances of general law not applying to cities*: *Langdon v. Fire Department*, 17 Wend. 234; *Furman v. Knapp*, 19 Johns. 248; *Municipality v. Railroad Company*, 10 Rob. (La.) 187; *Municipality v. Bank*, 5 *Ib.* 151. See *Sanders v. McLin*, 1 Ire. (Law) 572.

§ 612. In Virginia, the general laws imposing taxes for the support of the state government required railroad companies to pay into the state treasury, for every passenger transported, one mill for every mile of transportation, and then provided that "every company paying such shall not be assessed with *any tax* on its lands, buildings, or equipments." The charter of a city in that state gave it power to "raise money by taxes for the use of the city, provided the laws for that purpose be not repugnant to the laws of the state." It was held that the general tax law was intended to refer only to *state* taxation, and did not extend to municipalities; that the proviso in the city charter does not limit the power of the city to tax only such property or subjects as are taxed by the state; and that, under the above-mentioned power in its charter, the city could tax the real estate and personal property of the company permanently located therein, and the opinion was expressed that, as the residence or domicile of the company was in that city, it could also tax the rolling stock employed on the road of the company.¹

§ 613. But authority conferred by the charter of a village corporation to assess taxes "upon the freeholders and inhabitants of said village *according to law*," means according to the provisions and principles of the general tax law in force at the time the assessment is made.² So authority

¹ Railroad Company v. Alexandria, 17 Gratt. (Va.) 176. *Ante*, sec. 54.

² Ontario Bank v. Bunnell, 10 Wend. 186, 1833; approved, Buffalo v. Le Conteulx, 15 N. Y. 451, 455, 1857; American, &c. Company v. Buffalo, 20 N. Y. 381, 391, *per Denio*, J.; State Bank v. Madison, 3 Ind. 43, 1851; Gardner v. State, 1 Zab. (N. J.) 557. *Ante*, sec. 54.

"There are numerous bodies in this state, like the village in question, which possess to a limited extent the power of local taxation, and, I presume, in every instance the principles and mode of imposing a tax are ascertained by reference to the *general law*; and we should lament to be obliged to give to their several powers such a construction as would prevent a participation in the improvements of the system of taxation which are made from time to time and to be found only in the general law on the subject." *Per Nelson, J.*, in the Ontario Bank v. Bunnell, 10 Wend. 186, 1833. *Ante*, sec. 54.

How far the *general laws of the state* in regard to taxation apply to villages, towns, and cities, see Mayor, &c. of Troy v. Mutual Bank, 20 N. Y. 387;

in the charter of a city to "assess all *taxable* real and personal property within the city," refers to the general state law to ascertain what kind of property is subject to taxation, and the corporation has power to assess not only what was then taxable, but also whatever might afterwards be made subject to taxation by any general statute.¹

§ 614. The *general statutes of the state* upon the subject of taxing property undoubtedly refer to *private property*, and not to that owned by the state: and, in view of the public nature of municipalities, and the purposes for which they are established, heretofore explained,² the author is of

American, &c. Company v. Buffalo, *Id.* 388, note. In this last case, p. 891, Denio, C. J., lays down this proposition: "Where the general law is made applicable [to municipalities] in this way [that is, by words of reference to the general laws contained in their charters], any change in the general law would produce a corresponding change in the method of taxation by municipal corporations, the reference being to the law as it shall exist for the time being." Same principle. Ontario Bank v. Bunnell, 10 Wend. 186, 1833; Buffalo v. Le Conteulx, 15 N. Y. 451; Davenport v. Railroad Company, 16 Iowa, 348. The view of Wright and Dillon, JJ., in the case last cited was subsequently adopted by the Supreme Court. Bridge Company v. Dubuque, 32 Iowa, 427, 1871; State v. Town Council, 8 Rich. (South Car.) 214. Where a city is authorized "to levy a tax upon the tax-payers of the city, taxable under the revenue laws of the state," such tax must be levied upon the same persons and property as prescribed by the revenue laws of the state. The phrase "tax-payers of the city, taxable under the revenue laws of the state," designates both the person and subject of taxation. Banett v. Henderson, 4 Bush (Ky.) 255.

¹ Buffalo v. Le Conteulx, 15 N. Y. 451, 1857; 10 Wend. 186, *supra*; Davenport v. Railroad Company, *supra*; S. P. Tackaberry v. Keokuk, 32 Iowa 155, 1871; Lot v. Ross, 38 Ala. 156, construing the words "*taxable property*." But in South Carolina, in cases arising under the charter of the city of Charleston, which is authorized "to assess those who hold *taxable property* within the same," the words "*taxable property*" were construed "to mean *all property not exempt by law from taxation*," whether the state taxes the particular kind of property or not for state purposes. The words are not equivalent to the phrase, "*property taxed by the state*;" but *quære*. State v. City Council, 10 Rich. (South Car.) Law, 240, 1857; City Council v. St. Philip's Church, 1 McMul. (South Car.) Eq. 139; State v. City Council, 4 Strobb. (Law) 217; State v. City Council, 1 Mill. Ch. 40; State v. City Council, 5 Rich. (Law) 561; City Council v. Condy, 4 *Id.* 254; City Council v. State, 2 Speers (South Car.) Law, 719; *Id.* 623.

² *Ante*, chap. I. sec. 9, *et seq.*; chap. II. sec. 9a, *et seq.*; chap. IV. sec. 80, *et seq.*

opinion that such enactments do not, by *implication*, extend to any property owned by them—certainly to none owned by them for public uses.¹ On this ground it was held that a sale of lands, the property of a city corporation, and constituting part of the *city cemetery*, for taxes, was void.²

§ 615. The view just expressed has not, however, received, in its full extent, the sanction of the Court of Appeals in Kentucky. Under the statute laws of that state, there was *no express exemption of municipal property from taxation*, and the state, for state revenue, assessed against the city of Louisville a large amount of property, including the city hall, market houses, fire engines, wharves, &c., and the case presented the question whether the property was or was not exempt, by implication, from taxation by the state. And the judgment of the court was, that whatever property was used and held by the city for carrying on its municipal government, or was necessary or useful for that purpose, was not taxable by the state, and this would include public buildings, prisons, and property dedicated to charity; but that whatever is not so used, but is owned by the city in its “social or commercial capacity,” and for its own *profit*, such as vacant lots, market houses, fire engines, and the like, is subject to taxation.³

¹ *Ante*, chap. XV., as to Corporate Property, secs. 445, 446; *State v. Gaffney*, 84 N. J. Law, 131, 133, 1870, holding that land in good faith acquired by the city for water works is not taxable though not actually in use for such purpose.

² *People v. Doe*, 36 Cal. 220, 1868. *Ante*, sec. 590, n.

³ *Louisville v. Commonwealth*, 1 Duvall (Ky.) 295, 1864. The author, with deference to the learned court, ventures to observe that, in his judgment, the exemption should have been extended to all the property. Municipal corporations are not usually allowed to hold or deal in property directly for profit; and this is not the purpose for which authority is given to erect market houses or wharves, or to purchase and own fire engines. Of course the state might provide for the taxation of property owned by its municipalities, but its revenue laws should not be construed to extend to such property unless the legislative intention to that effect be manifest. See *People v. McCreery*, 34 Cal. 43. *Mayor v. Bank of Tennessee*, 1 Swan (Tenn.) 269. The *general government* cannot tax bonds belonging to a municipal corporation and held for municipal purposes. *United States v. Baltimore & Ohio Railroad Company*, U. S. Sup. Court, December Term, 1872, *Clifford and Miller*, JJ. dissenting. *Infra*, sec. 615a, and note.

§ 615a. It is settled by the Supreme Court of the United States, that the General Government has no authority to tax the means and instrumentalities employed by a State in conducting its governmental operations, and discharging its public duties.¹ In so far as municipalities are agencies of the State, the principle referred to extends to them, and so it has been recently decided by the National Supreme Court, where the point involved was the right of Congress to tax the income or property of a municipal corporation.² The question arose in this way: the city of Baltimore, under legislative authority, issued its bonds for a large amount, and made a loan of the proceeds to the railroad company defendant, taking a mortgage upon the road and franchises to secure the loan. The interest thus secured the United States sought to tax under the Internal Revenue Act.³ The court held that the tax could not be collected; that the nature of municipal corporations was such, and such was their relation to the State in the business of municipal rule, that they partook of the State's exemption from the power of the general government to tax its agencies and instrumentalities; and that, as respects the transaction out of which the case before the court arose, the city was acting within the scope of its public or municipal duties as an arm of the State, which might, if it had so chosen, have compelled the city against its assent or that of its citizens to have laid a tax, and made an appropriation of the proceeds to the railroad company.⁴

¹ The Collector *v.* Day, 11 Wall. 113, 1870. *Ante*, sec. 591.

² United States *v.* Baltimore & Ohio Railroad Company, December Term, 1872.

³ Sec. 122 of the Act of 1862 as amended in 1864.

⁴ United States *v.* Baltimore & Ohio Railroad Company, *supra*. The following is an extract from the opinion of the court: "We admit the proposition of the counsel that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could occupy with equal pro-

§ 616. As the burden of taxation ought to fall equally upon all, statutes *exempting persons or property are construed with strictness*, and the exemption should be denied unless so clearly granted as to be free from fair doubt.'

priety. It would not, in that action, be an auxiliary or servant of the state, but of the individual creating the trust. There is nothing of a governmental character in such a position. It is not necessary, however, to speculate upon hypothetical cases. We are clear in the opinion that the present transaction is within the range of the municipal duties of the city, and that the tax cannot be collected."

But as to property held by a city for public objects or upon charitable trusts of a public nature, there would seem, in the author's judgment, to be no ground for asserting a distinction and holding such property liable to taxation. *Ante*, sec. 487, *et seq.* Of course if a corporation is acting purely as a "private trustee" an exemption from taxation could not be claimed.

¹ *Orr v. Baker* ("church property"), 4 Ind. 86, 1853; *Gordon v. Baltimore*, 5 Gill (Md.) 231, 1847, and cases cited; *State v. Town Council* ("agricultural property"), 12 Rich. (South Car.) Law, 839; *Municipality v. Railroad Company* (inter-corporate real estate), 10 Rob. (La.) 187; *People v. Whyler*, 41 Cal. 351, 1871. *Post*, sec. 628, n. Power of state to exempt. *Tomlinson v. Branch*, 15 Wall. 460; *Munic. v. Bank*, 5 Rob. (La.) 151; *Trustees v. McConnell* (constitutional limitation), 12 Ill. 138; *Railroad Company v. Alexandria*, 17 Gratt. (Va.) 176, 1867. *per Joynes, J.*; *People v. McCreery*, 34 Cal. 43; *Life Asso. v. Board, &c.*, 49 Mo. 512. A subsequent statute exempting property from municipal taxation is valid against the municipality. *Richmond v. Richmond, &c. R. R. Co.*, 21 Gratt. (Va.) 604, 1872. Remedy of owner where property exempt from taxation is assessed. *Lee v. Thomas*, 49 Mo. 112, 1871; *Jefferson City v. Opel*, *Id.* 190; *Id.* 419; *St. Louis v. Ins. Co.*, 47 Mo. 393. *Cleino v. R. R. Co.*, 2 Dillon, 1873.

The *illegal exemption* of another from a tax or assessment is no ground for an injunction against the corporation unless the plaintiff is injured thereby, as by being compelled to pay more than his proportion. *Page v. St. Louis*, 20 Mo. 186, 1854. The *omission of an assessor to assess* certain parcels of property subject to taxation, whether arising from a misapprehension of the law, as by giving effect to void provisions of a statute, or a mistake of fact, will not invalidate his general assessment list. *People v. McCreery*, 34 Cal. 43. An omission by the assessors to assess a given individual because he is poor, and his property was of little value, does not invalidate the whole assessment. *Williams v. School District*, 21 Pick. 75, 1838; *Weeks v. Milwaukee*, 10 Wis. 242; *Kneeland v. Milwaukee*, 15 *Id.* 454; *Bond v. Kenosha*, 17 *Id.* 284; *Dean v. Gleason*, 16 *Id.* 1, 15; *Hersey v. Supervisors*, 16 *Id.* 185; *Hale v. Kenosha*, 29 Wis. 599.

The Wisconsin cases assert the following rule as to the effect of the omission to tax property liable to taxation: "Omissions of this character, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is entrusted, do not

Thus, although an "assessment" is in the nature of a tax and is authorized by, or is a branch of, the taxing power, yet a general statute exempting certain property—as, for example, churches—from "*taxation* by any law of the State," does not exempt it from liability for a street assessment.¹ So, in Maryland, the exemption of property of a cemetery company from "any tax or public imposition whatever," does not exempt it from a paving tax for improving a street in front of the property, the court (in an opinion elaborately examining the subject), holding that the intent of the legislature was to exempt the property from all taxes or impositions for the *purpose of revenue*, but not to exonerate it from charges inseparably incident to its location with respect to other property.² And the same view has been elsewhere sanctioned.³

necessarily vitiate the whole tax. But intentional disregard of those laws, in such manner as to impose illegal taxation on those who are assessed, does." *Per Paine, J.*, in *Weeks v. Milwaukee*, *supra*. The language was used in a case in which the city council, in view of the benefit which the construction of a new hotel would be to the city, intentionally omitted to cause the lots upon which it was being erected to be taxed. But *quære* as to this effect of even an *intentional* omission by the city council. *Dunham v. Chicago*, 55 Ill. 357, 1870, lays down the true rule. If the illegal exemption does not increase the amount which others are taxed, they are not injured. If it does, should they not compel, by *mandamus*, the city authorities to assess all the property liable to taxation? At all events, it is a very serious doctrine to hold that the omission, even though directed by the council, should have the effect to vitiate and overthrow the *whole tax list* for the year.

As to power of municipality to exempt property from taxation in any case. *State v. Addison*, 2 Sou. Car. 499; *Hayzlett v. Mount Vernon*, 33 Iowa, 229, 1871. *Infra*, secs. 620, m, 628, n.

¹ In the matter of the Mayor, &c., 11 Johns. 77. This is the leading case on the subject, and the point *decided* has been generally approved, although some of the reasons have been criticised. *People v. Mayor, &c. of Brooklyn*, 4 N. Y. (4 Comst.) 419, 432, and cases reviewed; *Bleecker v. Ballou*, 8 Wend. 263; *Sharp v. Spier*, 4 Hill (N. Y.) 76, 82; *Ib.* 92; *Presbyterian Church v. City of New York*, 5 Cow. 538; *Mayor, &c. of New York v. Cashman*, 10 Johns. 96; *Bap. Church v. McAtee*, 8 Bush (Ky.) 508, 1871.

² *Baltimore v. Cemetery Company*, 7 Md. 517, 1855. In thus holding, the

³ *Pray v. Northern Liberties*, 31 Pa. St. 69, 1850; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104, 1850; following 11 Johns. 77, *supra*. *S. P. Lockwood v. St. Louis*, 24 Mo. 20, 1856; *Garrett v. St. Louis*, 25 Mo

§ 617. But aside from the rule of strict construction which applies to exemptions from taxation, the cases cited in the previous section will show that there is, in their ordinary use, a recognized *difference between the words "tax" and "assessment,"* and that the one does not always, or usually, include the other. Thus, a constitutional provision

court does not proceed upon the ground that it was an *assessment*, and not a *tax*, which was sought to be collected from the cemetery company; it admitted it was a *tax*, but held it was not such a tax as was meant by the exempting statute, which is the sound view of the subject. The Chief Justice observes: "The distinction, if any, between a '*tax*' and an '*assessment*' is not very palpable. The meaning of the words is the same in our laws." *Per Le Grand*, C. J., *Id.* 535. See, also, *Dolan v. Baltimore*, 4 Gill (Md.) 394.

505; *Egyptian Levee Company v. Hardin*, 27 Mo. 495. In the case of the *St. Louis Public Schools v. St. Louis*, 26 Mo. 468, following *Lockwood v. St. Louis* (local assessment on church property), 24 Mo. 20, it was held that the real estate of the board of *public* schools of a city (a distinct corporation) was liable to a local assessment for sewers, sidewalks, opening streets, &c.; but *quære*. The exemption of a charitable corporation by its charter from "taxation of every kind," does not exempt it from an assessment upon its land to pay for a street improvement in front of it. *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155. See, also, *Emery v. Gas Company*, 28 Cal. 345, 1865; *Taylor v. Palmer*, 31 Cal. 240, 1866; *Brightman v. Kirner*, 22 Wis. 54. Exemption of an institution "from all *taxation* by state, parish, or city," is not an exemption from sidewalk or street *assessments*. *Lafayette v. Male Orphan Asylum*, 4 La. An. 1, 1849.

So a railroad charter exempting the company (in consideration of the payment of a certain tax) from "any other or further *tax* or *imposition* upon it," does not exempt it from liability for an assessment upon houses and lots owned by it and benefited by the opening and widening of a street; but the corporation cannot, for such a purpose, be assessed without reference to the special benefit conferred upon property owned by it, since such an assessment would be, in fact, a *tax* from which it is exempt. *State v. Newark*, 3 Dutch. (N. J.) 185, 1858. So an exemption from "*taxes, charges, and impositions*," does not exonerate a private corporation from assessments on its property for opening or paving streets on which it fronts. *Paterson v. Society, &c.*, 4 Zab. (N. J.) 385, 1854, following *Matter of Mayor, &c.*, 11 Johns. 77. Further illustrations, see, also: *Paine v. Spratley*, 5 Kansas, 525; *Chicago v. Colby*, 20 Ill. 614; *Bridgeport v. Railroad Company*, 36 Conn. 255; *Marshall v. Vicksburg*, 15 Wall. 146, as to "tax" and "wharfage charge." See, as to difference between "tax" and "assessment," and for views not coincident with those generally entertained, *Chicago v. Larned*, 34 Ill. 203, 1864; *Ottawa v. Spencer*, 40 Ill. 211; *Railroad Company v. Spearman*, 12 Iowa, 112. *Ante*, secs. 592, 603.

that "Taxation shall be equal and uniform throughout the State," does not apply to local assessments upon private property to pay for local improvements.¹ So a provision of the constitution of a State which requires "the rule of taxation to be uniform," in connection with another provision, that "It shall be the duty of the legislature to provide for the organization of cities, and to restrict their power of taxation, *assessment*, &c., so as to prevent abuses in *assessments* and taxation," is construed not to apply to special *assessments* by municipal corporations, made by authority of the legislature, for local improvements.²

§ 618. We have already had occasion to refer to the principle that *public powers* conferred upon a municipality to be exercised by its council when, and in such manner, as it shall judge best, are *incapable of delegation*.³ The principle extends to the authority conferred upon a municipal corporation to levy and collect taxes or to determine upon the necessity and character of local improvements.⁴

¹ *Draining Company Case*, 11 La. An. 388, 1856, where the subject is very fully examined. *S. P.*, *Surgi v. Snetchman*, (paving assessment) *Id.* 387; *Yeatman v. Crandall* (levee tax) *Id.* 220; *In re Ford*, 6 Lans. (N. Y.) 92. *Supra* secs. 594, 599, n. 600.

² *Weeks v. Milwaukee* (street assessment), 10 Wis. 242, 1860; *Lumsden v. Cross* (street assessment), *Id.* 282; *State v. Portage* (street assessment) 12 *Id.* 562; *Bond v. Kenosha* (harbor tax or assessment) 17 *Id.* 284. The Supreme Court of Wisconsin profess to follow the construction given by the Supreme Court of Ohio to similar provisions in the constitution of that state. *Hill v. Higdon*, 4 Ohio St. 248; *Reeves v. Wood County*, *Id.* 333. See observations of Judge *Cooley*. *Const. Lim.* 510, note. But the principle of uniformity is considered by the court to apply to ordinary municipal taxes. *Weeks v. Milwaukee*, *supra*, *per Paine, J.*; *Dean v. Gleason*, 16 Wis. 1-16. In *Bond v. Kenosha*, 17 Wis. 284, 1863, the Supreme Court of Wisconsin decided that the provision of the charter of the City of Kenosha, authorizing the council, for the purpose of constructing a harbor in the city, to levy a special tax on all lands within the city subject to taxation, *not including any improvements made thereon*, was in the nature of a special assessment for local improvements, and did not contravene any provision of the constitution of the state. *Hale v. Kenosha*, 29 Wis. 599; distinguishing *Bond v. Kenosha*, *supra*. *Supra*, secs. 598-600. *Infra*, sec. 622.

³ *Ante*, sec. 60, and cases cited. *Foss v. Chicago*, 56 Ill. 354.

⁴ *Id.* *McInerney v. Reed*, 28 Iowa, 410, 1867; *Meuser v. Risdon*, 36 Cal. 239; *Foss v. Chicago*, 56 Ill. 354, 1870; *Jenks v. Chicago*, 56 Ill. 397, 1870

§ 619. Not only the power to tax, but the power to make local improvements at the expense of the property benefited, is, like all other legislative power of the muni-

Railroad Company v. Chicago, 56 Ill. 454, 1870. In Scharwtz v. Flatboats, 14 La. An. 243, 1859, it was held (but *quære*, as to its correctness) that the power to "alien, lease, farm, and dispose of all and every kind of property," and to lay and collect taxes in *such a manner* as may be deemed expedient, on all steamboats, &c. landing at the levee of the corporation," gave the corporation power to lease, for a period of years, to a private person, the revenues of the port, with the privilege of collecting them in his own name, and for his own benefit.

The principle stated in the text is thus enforced by the Court of Appeals in Kentucky, in a case arising in the city of Louisville. In substance, the court say, the general council of the city of Louisville, by ordinance as prescribed in the city charter, may direct or authorize the sidewalks in the city to be graded, paved, curbed, &c. at the cost of the owners of the property fronting thereon. The council alone can determine the necessity of such improvement, as well as its kind and character, and has no authority to refer the determination of these matters to any other body or person. The power to pass ordinances to improve streets is legislative, and cannot be delegated. It is in effect a power of taxation, which is the exercise of sovereign authority. To ordain generally that a street or square shall be graded and paved, or "*so much thereof as the engineer may direct, and according to specifications to be furnished by him*," is simply to delegate to him the power to fix the grade, determine what materials should be used for the pavement, and how much of the street or square should be thus improved, and is not the determination of the council as to any of these things. To allow such an ordinance to bind the property holder is, in the opinion of a majority of the court, to destroy all the safeguards thrown around him by law. Subsequent acts of affirmance by the city council cannot validate an invalid ordinance. *Hydes v. Joyes*, 4 Bush (Ky.) 464. *Robertson, J.*, non-concurred. But where the act of the legislature charged the burden of certain local improvements upon the adjoining lots, and directed the street commissioners to make out the assessment, it is not necessary that the city assess the tax by an ordinance, and an ordinance to that effect, if passed, is not a delegation by the corporation of its power of taxation. *Schenley v. Commonwealth*, 36 Pa. St. 63, 1859. In South Carolina, under a general power to the *city council* to make local assessments and to appoint officers to execute the corporate powers and duties, it is held not to be a valid objection to an assessment that it was made, pursuant to ordinances or regulations, by the officers of the corporation and not by the corporation itself; for the city council is to be regarded as a local legislative body for the purpose of making by-laws, with power to cause them to be carried out; and particularly is such an objection without force when the assessments have first to be submitted to and approved by the council. *Cruikshanks v. City Council*, 1 McCord (South Car.) 360, 1821; *Ib.* 345. Compare *City Council v. Pinckney*, 1 Const. 42, 1812; S. C., 3 Brev. 217. Where such a course is expressly

city, a *continuing one*,—unless there be something to indicate the contrary, and hence it is not exhausted by being once exercised.¹ Therefore, the power to compel property owners to pave, ordinarily extends to compelling them to *re-pave*, when required by the municipal authorities.²

authorized by the charter, a grade for a street need not be previously fixed by the council, but it may require the adjoining owners to make certain improvements according to the direction of the city paver, who may thus determine the grade. *State v. New Brunswick*, 1 Vroom (N. J.) 895, 1860. See, further, *ante*, sec. 60. *Infra*, sec. 649.

¹ *Ante*, chap. XVIII. sec. 543. *McCormick v. Patchin*, Mo. Sup. Court, 1873.

² *Williams v. Detroit*, 2 Mich. 560, 1861. Power to "repair or pave streets," authorizes a corporation to remove an old pavement and replace it with a new one of a different description. *Gurner v. Chicago* (Nicholson pavement), 40 Ill. 165, 1866. In *Municipality v. Dunn*, 10 La. An. 57, 1855, the city sued to recover a portion of the cost of repaving a street in front of the defendant's lot. It appeared that the street had been previously paved with round stone, at the expense of the property. This, it was found, would not resist the heavy hauling, and was replaced by the one built of square block stone, for which suit was brought. The defence was that although the right to assess the property for the first pavement was given, yet the corporation had no right to compel a contribution from the same property for the second pavement. The majority of the court held that the power to pave the streets was a continuing power, to be exercised when the public good requires it, and extended as well to the making of a new in the place of an insufficient pavement as to the one first built—the equity in both cases being regarded as the same. These cases are approved in the late case of *McCormick v. Patchin*, Mo. Sup. Court, 1873, not yet reported, and the power of the legislature to authorize local assessments for re-paving admitted. As to re-paving, compare *Hammett v. Philadelphia*, 65 Pa. St. 146, cited *supra*, and see *Lafayette v. Fowler*, 34 Ind. 140; *State v. Jersey City*, 84 N. J. Law, 277, 1870. In *McCormick v. Patchin*, *supra*, *Wagner, J.*, makes the following reference to the case of *Hammett v. Philadelphia*, *supra*:—"The only cases which I have been able to find sustaining the views urged by the appellant, are those decided in the Supreme Court of Pennsylvania. The first and principal case is *Hammett v. Philadelphia*, 65 Pa. St. 146, in which a majority of the court held that, although the original paving of a street was a local improvement, and within the principle of assessing the costs upon the lots lying upon it, yet where a street was once opened and paved, it was thereby assimilated with the rest of the city and made part of it, and all the particular benefit to the locality derived from the improvements were then received and enjoyed. The learned Judge who delivered the prevailing opinion, discussed with considerable fullness the principles underlying the power to make assessments for local benefits. The opinion

§ 620. It is plain that the *powers of taxation* conferred upon the municipal authorities by the charter or organic act, and the mode of exercising such powers when prescribed therein, *cannot be varied by ordinances or by-laws.*¹ Therefore, a city corporation cannot impose terms or conditions which can affect the validity of a tax sale made within the authority conferred by the legislature.² So, under a charter constituting the city marshal the collector of taxes, and making it his duty to receive and collect the taxes due the corporation, it is not competent for the council by ordinance to dispense with the duties which the charter imposes upon this officer and devolve them upon another.³ So, under a charter authorizing a town corporation "to collect taxes upon all real estate within the town, not exceeding one-half per cent upon the assessed value thereof," it cannot pass an ordinance directing lots to be taxed without

consists mostly of generalizations in regard to established and well admitted principles. It is perfectly true that it would be wholly beyond the scope of legislative power to authorize a municipality to levy a local tax for general purposes. The burdens of the whole community cannot be shifted to the shoulders of one man who has only an interest in common with all the rest. The whole theory of local taxation or assessment is that the improvements for which it is levied afford a remuneration in the way of benefits. A law which would attempt to make one person or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation. In effect, it would be transferring the property of one individual to another. These are legal truisms which have long been entertained and firmly established. The line of separation exists between local and general taxation, and the boundary which lies between them is not always very clear or definite. The case of *Hammett v. Philadelphia* shows that it is difficult to draw the true line of distinction between these respective modes of taxation, and the Judge who wrote the opinion of the majority of the court finally placed it upon the fact that the act which he was construing relieved the case of all difficulty, and showed upon its face that the special taxation authorized was avowedly for a general and not local object. The law was for the uses and purposes of the public, and not especially beneficial to any particular class." See, also, as to local assessments: *State v. Leffingwell*, Mo. Sup. Court, 1873. *Ante*, sec. 596, n. *Supra*, sec. 616, n.

¹ *Ante*, chapter on Ordinances, sec. 251; *Weeks v. Milwaukee*, 10 Wis 242, which holds that the city cannot exempt from taxation property which the laws make taxable. *Post*, sec. 628, note.

² *Thompson v. Carroll*, 22 How. (U. S.) 422, 1859.

³ *Placerville v. Wilcox*, 35 Cal. 21, 1868.

considering the value of the improvements upon them, for since buildings are part of the land which the legislature had designated as the property to be taxed, such an ordinance makes a discrimination which the charter does not authorize.¹

§ 621. The authority of municipal corporations to levy and collect taxes is usually limited not only as respects the rate of taxation, but the objects of it.² Under grants of this character, the question has arisen not only as to what property the municipality *may*, but also as to what it *must*, subject to taxation for the purpose of obtaining revenue, or discharging liabilities. Thus, the city of New Orleans was authorized by charter "to raise money by taxation, in such manner as to the council shall seem proper, upon *real and personal estate*," &c. It was claimed that the city was bound to tax both species of property at the same time, and that a tax could not legally be imposed upon either alone. This view, however, was not sustained by the court, which said: "It does not appear to us that the power given to tax real and personal estate renders it imperative on the corporation to tax both. By the same section of the law, the city council are empowered to exercise their authority as to them may seem proper."³

§ 622. But there may be a *constitutional limitation* both upon the legislative and municipal power to select one

¹ *Fitch v. Pinckard*, 4 Scam. (Ill.) 78; approved, *Primm v. Belleville*, Illinois Supreme Court, April, 1872, 4 Chicago Legal News, 227.

² Power to levy taxes confined to kinds of property mentioned in the charter. *Rabassa v. Mayor, &c.*, 1 Martin (La.) N. S. 484; 8 *Id.* (O. S.) 218; *Blanc v. Mayor*, 1 Martin (N. S.) 65; *Id.* (O. S.) 120; *Harper v. Elberton*, 23 Geo. 566; *Municipality v. Johnson*, 6 La. An. 20, 1851; *Barrett v. Henderson*, 4 Bush (Ky.) 255; *Dubuque v. Insurance Company* (premiums received by local agent of foreign insurance company), 29 Iowa, 9.

³ *Oakley v. Mayor, &c.*, 1 La. 1, 1830; *S. P. Municipality v. Duncan*, 1 La. An. 182, 1847. The power of a city corporation to levy a general tax upon one species of property—for example, real estate—and to omit personal property, was, under the construction of special charter provisions, sustained in the case of *Frederick v. Augusta*, 5 Geo. 561, 1848; *Primm v. Belleville*, Illinois Supreme Court, 1872, reported in 4 Chicago Legal News, 227.

class of property for taxation and omit another. In an important case relating to this subject, there was a constitutional provision "that the rule of taxation shall be uniform," &c., which was considered to mean that all kinds of property not absolutely exempt must be taxed alike, by the same standard of valuation equally with other taxable property, and co-extensively with the territory to which it applies; and therefore a tax to pay a city debt ordered to be levied exclusively upon the *real* property within the city, is a discrimination in favor of personal property, and violates the uniformity required by the constitution, and is void.'

§ 623. Power to tax real and personal estate within the city corporation does not confer the right to tax *capital employed in merchandise*, distinct from the articles of property in which such capital is invested.'

§ 624. Authority in the charter of a municipal corporation to tax "all real and personal estate within the corporate limits of the city," was held, in view of the language and history of legislation in the state as to the subject matter of taxation, not to confer upon the corporation power to tax *income* or *particular occupations*.'

§ 625. Among the most usual of the express limitations upon the power of municipal taxation is the one confining it to property *within the corporation*. What property is to

¹ *Gilman v. Sheboygan*, 2 Black (U. S.) 510, 1862, approving on the constitutional point, *Knowlton v. Supervisors*, 9 Wis. 410; *Weeks v. Milwaukee*, 10 *Id.* 242; *Sanderson v. Cross*, *Id.* 282; *Attorney General v. Plank Road Company*, 11 *Id.* 42; *Zanesville v. Richards*, 5 Ohio St. 589; *Exchange Bank v. Hines*, 8 *Id.* 1. See *Muscatine v. Railroad Company*, 1 Dillon C. C. 586. *Ante*, sec. 42. *Supra*, sec. 593, *et seq.*, 599, note, 617, 620; *Hale v. Kenosha*, 29 Wis. 599. Uniformity, what is? *Livingston v. Albany*, 41 Geo. 21; *Mobile v. Dargan*, 45 Ala. 310.

² *Municipality v. Johnson*, 6 La. An. 20, 1851.

³ *Savannah v. Hartridge*, 8 Geo. 23, 1850; distinguished from cases in South Carolina, which hold that the city of Charleston, under the power to levy taxes on "*taxable property*," may tax income. *Linning v. Charleston*, 1 McCord, 345; 1 Nott & McCord, 527.

be considered *within* the municipality, so as to give the right to tax it, is, in some instances, hard to determine.¹ With respect to the *situs* of real estate, there can, ordinarily, be no doubt. But as respects *personal property*, its *situs* is often difficult to settle. If the property is tangible and is actually within the municipality, it is plain that it may be taxed by it, under the authority we are considering, irrespective of the residence or domicile of its owner.²

§ 626. In Indiana, where a city had authority by charter to tax all property "*within its limits*," it was holden that the share of the *part owner of a steamboat*, or the boat itself, though in the course of her voyage it necessarily touched at the city, was not subject to taxation by the city, though the owner or part owner be domiciled or resident therein.³ So, in Illinois, under power to tax property

¹ *St. Louis v. The Ferry Company*, 11 Wall. 423, 1870. It is obvious, says Mr. Justice *Swayne*, in this case, that the purpose of the legislature in conferring authority of this nature was not to tax property through the proprietor, but to tax things themselves, by reason of their being "*within the city*." *Id.* 481; *Trigg v. Glasgow*, 2 Bush (Ky.) 594; *Loud v. Charlestown*, 108 Mass. 278.

² *St. Louis v. The Ferry Company*, 11 Wall. 423, 430, *per Swayne, J.*; *Finley v. Philadelphia*, 32 Pa. St. 381; *Mills v. Thornton*, 26 Ill. 300; *Railroad Company v. Morgan County*, 14 Ill. 163; *Pomeroy Salt Co. v. Davis*, 21 Ohio St. 555, 1871; *Dunleith v. Reynolds*, 53 Ill. 45, 1869; *People v. Ogdensburgh*, 48 N. Y. 390, 1872; *St. Louis v. Wiggins Ferry Company*, 40 Mo. 580, 1867; *Hoyt v. Commissioners of Taxes*, 23 N. Y. 228; *New Albany v. Meekin*, 8 Ind. 481, cited *infra*, *People v. Niles*, 35 Cal. 282. As to taxation of personal property where the owner is a corporation or has his domicile in one town and does business in another, see *Gardiner, &c. Company v. Gardiner*, 5 Greenl. (Maine) 133, and cases there cited.

³ *New Albany v. Meekin*, 8 Ind. 481, 1852. As to place of taxation. *Evansville v. Hall* (domicil: insurance stock), 14 Ind. 27; *Reiman v. Shepard* (domicil; *situs* of personal property), 27 Ind. 283; *Madison v. Whitney* (bank stock), 21 Ind. 261; *Powell v. Madison* (pork owned by non-residents but slaughtered and stored in city), 21 Ind. 335; 18 *Id.* 33. *Perkins, J.*, in delivering the opinion of the court in the case first cited, says: "We do not think that, for the purposes of taxation, a court is authorized to apply the rule of law governing the personal estate of deceased persons which regards its *situs* as following the domicile of the owner. Surely, no one would risk asserting the general proposition that, under the charter of New Albany, all the personal property owned by every resident of the city, no matter where situated, was liable to be taxed by said city; that if a citizen

"within the limits of the city," a *steamboat* belonging to a resident of the city, but registered elsewhere, and only touching at the city during her trips up and down the river, cannot be taxed.¹ In Missouri it is held that where the home port of a steamboat is in a city, and the *nominal* owners reside in it, also, it is subject to taxation by the city.²

§ 627. So a municipality, under the power to tax property "within the city," has been held not to be authorized to tax the *ferry boats* of a *foreign* private corporation, whose chief relation to the city was regarded as being "merely that of contact there as one of the termini of their transit across the river in the prosecution of their business."³ Under the facts, as reported, the question is certainly a close one, and had previously been decided the other way by the Supreme Court of Missouri.⁴

§ 628. The property of a *street railway company*, including its road bed, situate within the limits of a municipal corporation, is ordinarily subject to its taxing power; and if no different provision be made, it has been held that

of New Albany was a partner in a steamboat plying on some river in California, or in a flock of sheep kept in Kentucky, in some part of Floyd county, in this state, out of the corporation of New Albany, he was liable to be taxed for it under its charter. We do not deny that the state might have authorized it to tax such property, but we think that she has not." 3 Ind. (Port.) 488; *Bates v. Mobile*, 46 Ala. 158, 1870.

¹ *Wilkey v. Pekin*, 19 Ill. 160, 1857. But, in Alabama, a municipal corporation with power to lay taxes "on real and personal estate within the city" was held authorized to levy a tax on a steamboat owned by a resident of the city and navigating the waters of a stream on which the city was situate. And the authority to tax was declared to extend even to cases where the owner of the boat was a non-resident of the state, if he resided in the city during the business season. And the power to tax in such cases was held to exist although the boats were registered and enrolled as coasting vessels under the laws of the United States. *Battle v. Mobile*, 9 Ala. 234, 1846.

See, further, as to taxation of *boats and vessels*: *Oakland v. Whipple*, 39 Cal. 112; *Hays v. Pacific Steamship Company*, 17 How (U. S.) 598; *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224; *St. Joseph v. Railroad Company*, 39 Mo. 476.

² *St. Joseph v. Sayville*, 39 Mo. 460.

³ *St. Louis v. The Ferry Company*, 11 Wall. 423, 1870.

⁴ *St. Louis v. Wiggins Ferry Company*, 40 Mo. 580, 1867.

a street railroad may be taxed as real estate.¹ An exclusive municipal grant to such a railway company to use the streets in the municipality, does not exempt it from municipal control nor deprive the municipal authorities of the right, otherwise existing, to require the company to pay a license or tax.² Nor does the payment of a tax or license of a specified sum or amount on each car employed by a city railway company to the city, as required by the contract between the company and the city, in which certain privileges are secured to the company, exonerate the company from the payment of an *ad valorem* tax on its property, horses, stables, and shops, which are assessable for municipal purposes.³ So the property of *gas companies* and of *water companies* within the municipality is, ordinarily, taxable by it.⁴

¹ Street Railroad Company Appeal, 82 Cal. 499, 1867; *People v. Cassidy*, 2 Lansing, 294; *City Gas Company v. Thurber*, 2 Rh. Ia. 15, 21, 1851, where gas pipes in streets were taxed as real estate. Compare *Gas Company v. County*, 80 Pa. St. 232. See, also, *Railroad Company v. Charlestown*, 8 Allen, 330; *Railroad Company v. Wright*, 2 Rh. Ia. 459; *City Railway v. Louisville*, 4 Bush (Ky.) 478; *St. Louis v. City Railroad Co.*, 50 Mo. 94, construction of special charter in respect of taxation. *Ante*, chapter on Streets, sec. 571, note.

² *State v. Herod*, 29 Iowa, 123, 1870. *Ante*, sec. 571.

³ *City Railway Company v. Louisville*, 4 Bush (Ky.) 478.

⁴ *Commonwealth v. Lowell Gas Company*, 12 Allen, 75. Pipes laid in the streets of a city by a gas company, under a grant in their charter, are fixtures, and taxable as real estate. *Providence Gas Company v. Thurber*, 2 Rh. Ia. 15, 1851. But see *Gas Company v. County*, 80 Pa. St. 232, 1858. Lessee and proprietor of city water works for a term of years, whose contract of lease did not stipulate for exemption from city taxation, was held taxable in respect to such works, they being treated as real estate. *Stein v. Mobile*, 24 Ala. 591, 1854. S. P. in *Stein v. Mobile*, 17 Ib. 334.

The legislature may restrict the the tax authorized to be levied for water works for the supply of water to the inhabitants of cities and for extinguishing fires to the district which is benefited and protected by such works. *Grant v. Davenport*, Iowa Sup. Court, April, 1873, not yet reported.

In this case it was also ruled that where an ordinance provided that in consideration of certain covenants by a water company to supply the city with water, its franchise and all property actually required for the management of its water works shall be exempt from municipal taxation, that such provision was not an exemption from taxes, but was in effect a payment of the taxes by the performance of the covenants on the part of the water company, but *quære*? See *Ante*, secs. 614-616, 620.

§ 629. A general statute of the state provided that the capital stock of the State Bank should be taxable *only for state purposes*, and afterwards a city corporation undertook to levy and collect a municipal tax on certain real estate owned by the bank and forming part of its capital stock; but this, it was adjudged, could not be done, the city and its powers being entirely under the control of the legislature.¹

A *paving assessment* upon the property of a railway company, sustained, and it was held that the special remedy by lien and foreclosure was not exclusive, and that an action of debt would lie to recover the assessment. It was also held that the company was estopped by its conduct, in seeing the paving done without objection, to set up that its charter required it to pave the road covered by the track at its own expense. *New Haven v. Fair Haven, &c. R. R. Co.*, 38 Conn. 422. *Supra*, sec. 537, note.

¹ *State Bank v. Madison*, 3 Ind. 43, 1851; *Same v. Brackenridge*, 7 Blackf. (Ind.) 395, 1845. See, also, *Gardner v. State* (holding under a charter that a state tax was in lieu of all local taxes), 1 Zab. (N. J.) 557. So, in Louisiana, a restriction upon the state in reference to the taxation of banks was held to extend to municipal corporations deriving their authority from the state. *New Orleans v. South Bank*, 11 La. An. 41; *Municipality v. Bank*, 5 Ib. 394; *New Orleans v. Bank*, 10 Ib. 735; *New Orleans v. Bank*, 15 Ib. 89. A village corporation was authorized "to raise money by a tax to be assessed upon the freeholders and *inhabitants*, according to law," and it was decided that a banking corporation located and doing business in the village was an *inhabitant*, and taxable. *Ontario Bank v. Burnell*, 10 Wend. 186, 1833.

As to taxation of *banks and bank stock* by municipalities in which the banks are located: *Madison v. Whitney*, 21 Ind. 261; *Evansville v. Hall*, 14 Ind. 27; *King v. Madison*, 17 Ind. 48; *Connorsville v. Bank*, 16 Ind. 105; *State Bank v. Madison*, 3 Ind. 43; *Madison v. Whitney*, 21 Ind. 261; *Gordon v. Baltimore*, 5 Gill (Md.) 231. Compare *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 133; *Bank v. Town Council*, 10 Rich. (South Car.) Law, 104; *State v. City Council*, 5 Ib. 561 (dividends); *Bank v. City Council*, 3 Ib. 342 (real property); *Bulow v. City Council*, 1 Nott & McCord, 527 (shares in United States Bank); *Cherokee Insurance Company v. Justices*, 23 Ga. 121; *The Bank v. Mayor, &c., Dudley*, 130, 1832. See *Mayor v. Hartridge*, 8 Ga. 23; *Nashville v. Thomas*, 5 Coldw. (Tenn.) 600, 1868; *O'Donnell v. Bailey*, 24 Mis. 386. In *The State v. Dawling* (March Term, 1872, of the Supreme Court of Missouri, 50 Mo.) it was decided that a city had the power to tax the stock of the citizens in a National Bank located therein, though the capital of the bank be invested in United States stocks, which are exempt from taxation. And it was further held, in the same case, that the action of the city assessor in assessing such stock, and of the City Council sitting in appeal on such assessment, might be reviewed on certiorari.

Municipal taxation of railroads. Railroad track and property held liable

§ 630. The legislature may authorize municipal corporations to impose taxes upon persons whose *ordinary avocations are pursued within the corporate limits*, although residing beyond those limits, the same as upon residents.¹

to municipal taxation in the towns or cities where situate. *Railroad Company v. Wright*, 5 Rh. Is. 459; approved, *Railroad Company v. Connelly*, 10 Ohio St. Rep. 159, 164. To same effect, *Railroad Company v. Clute*, 4 Paige Ch. 384; *Wheeler v. Railroad Company*, 12 Barb. 227; *Railroad Company v. County of Morgan*, 14 Ill. 163. And such property is subject, also, to *special taxes and assessments*. *Railroad Company v. Connelly*, 10 Ohio St. 159-164, 1859; *Railroad Company v. Spearman*, 12 Iowa, 112. *Supra*, sec. 628, n. Further, as to the liability, under special statute or charter provisions, of *railroads*, their property and stock, to municipal taxation: *Davenport v. Railroad Company* (rolling stock and real estate), 16 Iowa, 348. The views of *Wright*, C. J., and *Dillon*, J., were subsequently adopted by the court. *Bridge Co. v. Dubuque*, 22 Iowa, 427, 1871; *Bibb Co. v. R. R. Co.*, 40 Geo. 646; *Railroad Company v. Alexandria*, 17 Gratt. (Va.) 176; distinguished, *Richmond v. Railroad Co.*, 21 Gratt. (Va.) 604, 1872; *Railroad Company v. Lafayette*, 22 Ind. 262, 1864, as to power and mode of taxing railroads in Indiana; *Railroad Company v. State* (rolling stock), 25 Ind. 177; *Applegate v. Ernst*, 3 Bush (Ky.) 648; *Rome Railroad Company v. Rome*, 14 Ga. 275; *Augusta v. Railroad Company*, 26 Ga. 651, 1858; *Richmond v. Daniel*, 14 Gratt. (Va.) 385, 1858; *Baltimore v. Railroad Company*, 6 Gill (Md.) 288; *North Mo. Railroad Company v. Maguire*, Supreme Court Mo., 1872, not yet reported.

Taxation of insurance companies. *St. Louis v. Ins. Co.*, 47 Mo. 146, 168, 176; *Dubuque v. Insurance Co.*, 29 Iowa, 9.

Choses in action, &c. In *Johnson v. Oregon City*, 2 Oregon, 327, 1868, notes and mortgages belonging to a resident inhabitant were held taxable, although deposited outside of the city. But in *Johnson v. Lexington*, 14 B. Mon. 648-661, 1854, authority to a municipality to tax real and personal property was held limited to visible property actually situated within it, and *not to extend to debts and choses in action*. See, in same state, *Louisville v. Henning*, 1 Bush (Ky.) 381, as to taxability of money and things in action. Power to a municipality "to levy and collect a tax upon every species of property, real and personal, within the city, subject to taxation by the laws of the state," was held, in Georgia, to give no authority to levy a tax upon *notes* belonging to a resident, and within the city, where the makers do not reside therein. *Bridges v. Griffin*, 33 Ga. 113, 1861. See *People v. Ogdensburgh*, 48 N. Y. 390, 1872. Power to tax *all personal estate* gives authority to tax *money loaned*. *Trustees v. McConnel*, 12 Ill. 138, 1850. *Supra*, sec. 591, n.

¹ *Worth v. Fayetteville*, 1 Winst. (North Car.) part II. 70, 1864. What property may be taxed under such authority. *Ib.* As to right to tax (under special charter provisions) persons residing without, but exercising a

§ 631. The power to tax must be fairly and impartially exercised by the municipal authorities, who cannot *discriminate between residents and non-residents* by taxing the property of the latter within the corporation at a higher rate, or in a different manner, from the like property of the former.¹

§ 632. The usual provisions in the constitutions of the different states concerning taxation do not prohibit the legislatures from imposing, or authorizing municipal authorities to impose, *taxes upon trades, special professions, and occupations*.²

trade or calling *within*, the corporation, see, also, *State v. City Council*, 2 Speers (South Car.), Law, 623; *Id.* 719. What may be taxed under authority to tax "income and profits" of non-residents doing business within the corporation, see *City Council ads. State*, 2 Speers (South Car.) Law, 719; *Bates v. Mobile*, 46 Ala. 158, 1870. Taxableness of goods owned elsewhere, but *sold on commission* by residents of the municipality. *Cumming v. Mayor, R. M. Charl.* (Ga.) 26; *Green v. Mayor, Id.* 368; *Paddleford v. Mayor*, 14 Ga. 438, criticising *Brown v. Maryland*, 12 Wheat. 419; *Peace v. Augusta*, 37 Ga. 597; *Shriver v. Pittsburgh*, 66 Pa. St. 446.

¹ *City Council ads. State*, 2 Speers (South Car.) Law, 719, 1844; *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554, 1868. In this last case it was held that there could be no discrimination between merchants selling by sample and those doing business in a different manner. Statutes authorizing the "registration and taxation" of vehicles using the paved streets of a town are strictly construed; and such an act was held not to extend to non-residents. *Bennett v. Birmingham*, 31 Pa. St. 15, 1850. *Ante*, secs. 540, 604.

² *Sacramento v. Crocker*, 16 Cal. 119; *Simmons v. State*, 12 Mo. 268; *Gilkerson v. Justices* (taxation of offices), 18 Gratt. (Va.) 577, 1866; *Selectmen v. Spalding*, 8 La. An. 87, taxability of "floating palaces," or boats for circus exhibitions, affirmed. *Id.*; *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554; *Mason v. Lancaster* (tavern keeper), 4 Bush (Ky.) 406; *The Germania v. The State* (taxation of amusements), 7 Md. 1; *Sears v. West* (billiard tables), 1 Murph. (North Car.) 291; *Commissioners v. Patterson* (tax on retailers, &c.), 8 Jones (North Car.) Law, 182; *Keller v. State* (taxation by license on beer manufacturers), 11 Md. 525; 31 Iowa, 498; *Id.* 102. *Stare v. Schlier*, 3 Hensk. (Tenn.) 281, 1871.

"The power of the state to tax professions is unquestioned (*Simmons v. State*, 12 Mo. 268), and the state may delegate the authority [to municipal corporations], but it should be done in clear and unambiguous terms." *Per Wagner, J., St. Louis v. Laughlin*, 49 Mo. 556, 1872. A provision in the charter of a city giving it power to license, regulate, and tax certain enumerated classes of persons and business, and concluding with the words

§ 633. The extent of the power of the legislature over municipal corporations generally,' including the power to *fix and change the corporate boundaries*,' has been before considered. Where the boundaries have been originally fixed or subsequently changed so as to include within them *rural or agricultural lands* which have never been platted, are not needed for town lots, and which receive no direct benefit from the municipal government or expenditures, questions have arisen respecting the right to *subject such lands to ordinary municipal taxation*. The power of the legislature to fix or enlarge the corporate boundaries is not disputed, but it is the power to require *such* lands to contribute to the municipal treasury that has been controverted. In Kentucky' (the decisions in which have been followed in

"and all other business, trades, avocations, and professions whatever," was held not to confer the power to require a license tax from lawyers, as they were not of the same generic character or class with those specified. *Ib.*

Under authority to collect taxes on "auctioneers, transient dealers, and pedlars," a municipal corporation may impose a tax either upon the amount of the sales of such persons, or in the form of a license or tax upon the privilege of selling. *Carroll v. Mayor, &c.*, 12 Ala. 173, 1847. In exercising this discretion it is safer for the corporation to adopt the mode, if any, by which such persons are taxed by the state law. *Brokers*, who may be taxed as. *Portland v. O'Neill*, 1 Oregon, 218.

The right to impose *specific taxes* is recognized by the constitution of Michigan. *Walcott v. People* (taxation of express companies), 17 Mich. 68; *Williams v. Detroit* (paving tax), 2 Mich. 560; *Woodbridge v. Detroit*, 3 Mich. 274. In Wisconsin, see *Kneeland v. Milwaukee*, 15 Wis. 454. In Pennsylvania, see *Durach's Appeal* (power to tax saloon keepers to maintain police force) 62 Pa. St. 491, 1869. It is here said that a special tax levied upon an individual or particular individuals would infringe the implied restrictions on the power of taxation, but in the exercise of this power persons and things may be classified, and it is sufficient if it includes all of a class within the taxing district. *Ib.*, *per Sharnwood, J.* *Ante*, sec. 34.

¹ *Ante*, chap. IV. sec. 29 *et seq.*

² *Ante*, chap. VIII. secs. 124, 126, 127.

³ *Cheaney v. Hooser*, 9 B. Mon. 380; *Sharp v. Dunoven*, 17 *Ib.* 223; *Maltus v. Shields*, 2 Met. (Ky.) 553; *Southgate v. Covington*, 15 B. Mon. 491, 1854. The legislature may tax suburban property, within city limits, as such, to support needed local government and the enforcement of police regulations *in and about the property taxed*; but it cannot embrace such property within corporate limits merely for revenue purposes, in order to lessen the burden of others. *Arbegust v. Louisville*, 2 Bush (Ky.) 271, 1867.

Iowa and Nebraska) the principle has been adopted that the "courts will, in such cases, control and limit the taxing power to that point or line where it ceases to operate beneficially to the proprietor in a *municipal point of view*."

Swift v. Newport, 7 Bush, 87; Bradshaw v. Omaha, 1 Neb. 16; Henderson v. Lambert, 8 Bush, 607.

¹ Langworthy v. Dubuque, 16 Iowa, 271, *per Lowe*, J.; approved, Fulton v. Davenport, 17 Iowa, 407. The most recent cases in the Supreme Court of Iowa, Durant v. Kauffman, and Mitchell v. Davenport, 34 Iowa, 194, 1872, declare an adherence to the rule established by the previous cases, but evince no disposition to extend the exemption from municipal taxation. C. J. Beck, in the course of his opinion, remarks: "The mere fact that lands are included within the limits of a municipal corporation does not authorize their taxation for general city purposes. Under certain conditions, they are exempt therefrom. These conditions are such that the property proposed to be taxed derives no benefits from being within the city limits. This is the rule recognized by the various decisions of this court upon this subject. To enable us correctly to apply the rule above stated, we must consider and determine the character of the benefits which will render lands within a city liable to general municipal taxation. These are not such as attach to all lands near to a city or large town whereby they are rendered more valuable, but are such as accrue to the lands considered as city property. Lands lying contiguous or near to a city, though incapable of any use except for agricultural purposes, are nevertheless of greater value on account of their location than those more remotely situated. Convenience to a market, &c., &c., adds to their value. Therefore lands within a city kept and alone used for agriculture, and not capable of being used as city property, and not demanded for that purpose, nor possessing a value based upon adaptation for the purpose of dwellings or business, cannot be considered directly benefited by the fact of their being within the city limits. Such lands shall not be taxed for general municipal purposes. In determining the benefits accruing to such lands, a controlling fact to be considered is the purpose for which they are held. If held as city property, to be brought upon the market as such whenever they reach a value corresponding with the views of the owner, they ought to be taxed as city property. There would neither be reason nor justice in permitting a proprietor of a large tract of land within a city to hold it for an opportunity to bring it into the market as city lots, and for no other purposes, under the pretence that it is agricultural lands, thus escaping taxation for the general improvement of the city—the very thing which will bring his lands into market, and thus add greatly to their value—a direct benefit to the owner. In such a case, the general improvement of the city, the building of streets near or in the direction of the lands so held, the construction of water works, public buildings, &c., &c., by which the prosperity of the city is advanced, and an invitation to population is held out, all bestow direct benefits upon the owner of such property. The lands

The general rule is that the right to subject property to real municipal taxation extends only to such as has been surveyed and platted into lots, but the right to tax *may*, under circumstances, extend to property which has never been platted.

§ 634. We deduce from the cases on this subject, in the states named, the following rules or *criteria* to determine the taxability of such lands: So long as the land thus embraced in the corporate limits is used solely for agricultural or horticultural purposes, or lies vacant and is not laid out into town lots, nor needed or required for streets or houses or other purposes of a town, nor benefited by being within the town, the corporation authorities cannot, for strictly corporate purposes, tax the property as town property, without the consent of the owner. But, on the other hand, when the property sought to be taxed is within the corporate limits in such close proximity to the settled and improved portions of the town or city, that the corporate authorities cannot open and improve the streets and alleys and extend its police regulations, &c., without incidentally benefiting the property and enhancing its value—where, in other words, the property is needed for buildings and houses, or is benefited by the local government—then the power to tax the same exists, though it may not actually be laid out into lots. Under these rules, each case must be decided upon its special circumstances. If the owners have laid off the same into lots, it is to this extent clearly liable to municipal taxation. And property, though not liable to ordinary *municipal* taxation, may yet be liable for road and school taxes, where the city or town is a road or school district, levying its own taxes for these purposes.¹

being a part of the city, in fact, and held by their owner for the increase in value which he expects because they are city lots, are benefited by the municipal government, and share in the benefits derived by the expenditure of revenue raised by taxation. If property be so held within a city, whether it be sub-divided into lots, and streets thereon are dedicated to public use, or be inclosed and cultivated as agricultural lands, it ought to be subject to general municipal taxation. This result is directly deducible from the rule established by the decisions of this court."

¹ See, in addition to the cases from Kentucky, the following: *Morford v. Unger*, 8 Iowa, 82 (the first and leading case in Iowa); followed by *Butler*

§ 635. The power to *pave streets*, usually conferred in general but express terms, at the expense, in whole or in part, of the property benefited by the improvement, has given rise to some decisions which may be noticed. In holding

v. Muscatine, 11 Iowa, 433; *Langworthy v. Dubuque*, 13 Iowa, 86; Same case, more fully, 16 Iowa, 271; *Fulton v. Davenport*, 17 Iowa, 404; *Buell v. Ball*, 20 Iowa, 282, 1866; *Railroad Company v. Spearman*, 12 Iowa, 113; *Deeds v. Sanborn*, 26 Iowa, 419, 1868; S. C., 22 Iowa, 214; *Deiman v. Fort Madison*, 30 Iowa, 541, 1870; *S. P. Bradshaw v. Omaha*, 1 Neb. 16.

In *Buell v. Ball*, *supra*, *Cole, J.*, in delivering the opinion, says: "The ground upon which courts interfere in such cases is, that private property shall not be taken for public use without just compensation. It is the fact of taking without compensation, and not the time or manner, which constitutes the infraction of the constitutional inhibition. The fact may be as effectually accomplished by an original incorporation as by an amendment, and the constitutional guaranty would be of little avail if it could be avoided by mere form." The Kentucky cases rest upon the same ground.

The practice of embracing within the corporate limits large tracts of land for the sole purpose of taxation is not unusual, and the doctrine adopted by these courts is the only way in which the proprietor can be relieved from a very unjust burden, and it works no wrong to the corporation, because the courts will fix the line of taxability upon an intelligent consideration of the circumstances of each case. In *Benoist v. St. Louis*, 15 Mo. 668; *St. Louis v. Allen*, 13 Mo. 400, and *Same v. Russell*, 9 Mo. 503, the only constitutional question decided was that the legislature had the power to extend the city limits and subject the property in the annexed territory to taxation, against the will or without the consent of the inhabitants affected thereby. In *Barker v. State*, 18 Ohio, 514, 1849, it was held (the constitutional question not being raised) that, for the improvement of streets, alleys, and sidewalks (the charter discriminating between this and a tax for "*corporation purposes*"), a municipal tax might be levied on *farming land*, not laid out into lots and recorded as such, if within the corporate limits. *Ante*, sec. 126.

A provision in a charter extending the city limits, that land in the annexed territory, *used exclusively for farming purposes*, or *vacant and unoccupied*, should be taxed not exceeding a specified rate, construed, and it was held not to be an exemption, and therefore to be strictly construed, but an equitable apportionment of burdens with reference to benefits, and the court regarded the *practical and beneficial use* to which the land was put, and not the purpose for which it was held. *Gillette v. Hartford*, 31 Conn. 351, 1863. Taxation of rural property in corporate limits for urban uses, see: *New Orleans v. Michoud*, 10 La. An. 763; *Municipality v. Ursuline Nuns*, 2 La. An. 611; *Same v. Michoud*, 6 *Id.* 605; *Serrill v. Philadelphia*, 38 Pa. St. 355. Liability to local assessments. *Kalbrier v. Leonard*, 34 Ind. 497.

that the power to *pave* includes the power to *gravel* streets, the Supreme Court of Illinois thus defines the word *pavement*: "A pavement is not limited to uniformly arranged masses of solid material, as blocks of wood, brick, or stone, but it may be as well formed of pebbles, or gravel, or other hard substances, which will make a compact, even, hard way or floor."¹

§ 636. The power to *pave streets* includes the power to furnish and do all that is necessary, usual, or fit for paving;² and on this ground it has been held that the expense of *grading* a street preparatory to paving is incident to paving, and the expense properly included in the assessment.³ And in Pennsylvania it is decided that the power to pave includes the power to furnish, or require the party at whose expense it is done to pay for, *curbstones*.⁴ And so as to

¹ *Per Caton, C. J.*, in *Burnham v. Chicago*, 24 Ill. 496, 1860. The word "pave" includes the usual means to cover with stone or brick, so as to make a level or convenient surface for horses, carriages, or foot passengers. It includes macadamizing. *Warren v. Henly*, 31 Iowa, 31. Authority to *pave* authorizes *sidewalk to be made of plank or other material*, in the discretion of the council. *Railroad Company v. Mt. Pleasant*, 12 Iowa, 112. Authority to a city to require abutting lot owners to "pave the street," includes, also, authority to require them to build sidewalks. *Warren v. Henly, supra*. In Louisiana, it is held that the power to make sidewalks, at the cost of the adjoining lot owners, includes the *guttering and curbing*. "By common consent," remarks the court, "it is considered that the term *pavement* embraces the brick sidewalks, of which the curb and gutters form a part." *O'Leary v. Sloo*, 7 La. An. 25, 1852. In *Powell v. St. Joseph*, 31 Mo. 347, 1861, it appeared that the defendant corporation was authorized to assess the cost of paving streets to the owners of adjoining property in proportion to their fronts. This was held to authorize the city authorities to apportion the cost of *paving the street crossings*, as well as of such parts of the street as were in front of lots, among the lot holders of the adjoining blocks, in proportion to the front feet. Abutters may be assessed for *paving street crossings*. *Creighton v. Scott*, 14 Ohio St. 438; *Williams v. Detroit*, 2 Mich. 560, 1861. As to *paving intersections*. *State v. Elizabeth*, 1 Vroom (N. J.) 365, 1863; *Matter of Eager*, 46 N. Y. 100, 1871; *Hines v. Lockport*, 41 How. (N. Y.) Pr. Rep. 435.

² *Schenley v. Commonwealth*, 36 Pa. St. 29, 30, 60, 1859; *McNamara v. Estes*, 22 Iowa, 246, 1867. *Ante*, sec. 397.

³ *State v. Elizabeth*, 1 Vroom (N. J.) 365, 1863; *Williams v. Detroit*, 2 Mich. 560, 1861. *Ante*, sec. 397.

⁴ *Schenley v. Commonwealth, supra*. In this case the city of Allegheny

trimming and guttering; these were held to be included in the power to *macadamize*.¹

§ 637. Under an authority to make such by-laws as to the common council shall seem "necessary for the good government of the city, and for the regulation and paving of the streets and highways," a city corporation may pass an ordinance requiring the owner of every lot fronting on a designated section of a public street to fix curbstones and make a *brickway* or *sidewalk* in front of his lot. Such an ordinance is neither unconstitutional, illegal, nor unreasonable. It would doubtless be otherwise, it is remarked, if this burden was laid without special cause upon one citizen, all others similarly situated being exempted.²

was authorized "to grade and pave streets, sidewalks," &c., and to levy a special tax upon the lots fronting thereon to defray the expense. The question was made that the cost of *curbstones* was not a legitimate charge upon the lot owners. But the court held otherwise, observing that "the power to pave includes the power to furnish and do all that is necessary, usual, or fit for paving. How can the court say, as a legal proposition, that curbstones were neither necessary, customary, nor fit for such a work? Common observation shows that it is usual to employ curbstones when streets, sidewalks, or footways are paved, and that they are among the ordinary means used. But whether they are or not was a question for the jury." See, also, *Williams v. Detroit*, 2 Mich. 560, 1861; *Steckert v. East Saginaw*, 22 Mich. 104, 1870; *Dean v. Borchenius*, 30 Wis. 236, 1872.

¹ *McNamara v. Estes*, 22 Iowa, 246, 1867; *Williams v. Detroit*, just cited. The substitution of new curbstones and gutters in a street were held to be "*repairs*." *People v. Brooklyn*, 21 Barb. 484. *Supra*, secs. 597, 619. Construction of special charter provision as to macadamizing. *New Haven v. Whitney*, 36 Conn. 373.

² *Paxton v. Sweet*, street commissioner of Trenton, 1 Green (N. J.) 196, 1832, cited with approval by *Putnam, J.*, in *Boston v. Shaw*, 1 Met. 130-133, 1840. See *Downer v. Boston*, 6 Cush. 277, and observation (*arguendo*) of *Shaw, C. J.*, p. 281, as to vacant lots. Assuming that the power was properly construed, the duty enjoined by the ordinance could not be enforced by a sale of the property unless authority to that effect was unequivocally conferred by the legislature. Construing certain acts *in pari materia*, the court held that the lessee for a long term of years, and not the owner of the fee, was the "proprietor" or "owner" to assent to, or petition for, the paving of streets. *Holland v. Baltimore*, 11 Md. 186, 1857. Tenant in dower in actual possession is an "owner" within the meaning of the charter requiring "owners" of lots to build sidewalks in front thereof. *White v. Mayor, &c.*, 2 Swan (Tenn.) 364, 1852. Power to pave at the expense of the adjacent owner, being limited and special, must be exercised strictly

§ 638. Under power to improve "any street," the city council is *not required* to improve *the entire length* of the street or none; it may improve part, and confine the assessment to the lot adjoining the part improved.¹

§ 639. Where the *power* to pave depends upon *the assent or petition of a given number or proportion* of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite

according to law. *Henderson v. Baltimore*, 8 Md. 352, 1855. *Supra*, secs. 605-607.

As to right to *relief in equity* against illegal taxes and assessments, see chap. XXII. *post*, secs. 727-738.

¹ *Scoville v. Cleveland*, 1 Ohio St. 133, approved and applied in *Railroad Company v. Connelly*, 10 Ohio St. 159-163. *S. P. Creighton v. Scott*, 14 Ib. 438. See, also, *St. Louis v. Clemens*, 36 Mo. 467; *Lafayette v. Fowler*, 34 Ind. 140. Compare *Chesnut Av.*, 68 Pa. St. 81.

A town was empowered, "when requested in writing by the owners of two-thirds of the property on any street, or *part* thereof, to cause the same to be graded, and to levy the expense on the property bounding on such street," &c. Under this charter the Court of Appeals of Maryland decided that "the assent of the owners of two-thirds of the property on the whole line of the street to be improved was a pre-requisite to the exercise of the authority conferred upon the corporation. If a *part* only is to be improved, the charter enables the corporation to grant an application made for that object by the owners of two-thirds of the property lying on that part, by an ordinance directing that particular part of the street to be improved. They can only order the *whole* street to be improved by an application from two-thirds of the property owners on the whole street." And it was held that where the town, on a petition of the owners of two-thirds of the property lying upon a *part*, only, of the street, improved the *whole* street, its action was unauthorized, and that it could not enforce the collection of the expenses of such improvement from the adjoining property owners. *Swann v. Cumberland*, 8 Gill (Md.) 150, 1849. May order sidewalk upon one side only. *State v. Portage*, 12 Wis. 562. Lot owner opposite a public common held, upon construction of the statutes, to be liable for the expense of grading and paving the *whole*, and not simply half, of the street in front of his lot. *McGonigle v. Allegheny*, 44 Pa. St. 118, 1862. The city may grade and improve *less than the whole width*. *Morrison v. Hershirc*, 32 Iowa, 271, 1871. *Ante*, sec. 256, note. Under the charter of St. Louis it was held that special assessments or taxes for street improvements could not be enforced until the entire contract was completed, for the reason that the grading of a single lot or block, instead of the whole work, might be an injury rather than a benefit. *St. Louis v. Clemens*, 49 Mo. 552, 1872. Right to join in a single assessment the expense of constructing sidewalks in different streets denied. *Arnold v. Cambridge*, 106 Mass. 352.

number had assented or petitioned is not, in the absence of legislative provision to that effect, *conclusive*, and the want of such assent makes the whole proceeding void, and the non-assent may be shown as a defence to an action to collect the assessment,¹ or may, it has been held, be made the basis for a bill in equity to restrain a sale of the owners' property to pay it.² Accordingly, where a charter pro-

¹ *Henderson v. Baltimore*, 8 Md. 352, 1855; *Carron v. Martin*, 2 Dutch. (N. J.) 594, 1857; *Camden v. Mulford*, 2 Dutch. 49, reversing S. C., *Id.* 228; *State v. Elizabeth*, 1 Vroom (N. J.) 176, 1862; *Bouldin v. Baltimore*, 15 Md. 18, 1859; *Holland v. Baltimore*, 11 Md. 186, 1857; *Kyle v. Malin*, 8 Ind. 34; *State v. Orange*, 32 N. J. 49; *State v. Hand*, 2 Vroom (N. J.) 547; *Baltimore v. Eschback*, 18 Md. 276, 1861; *Wells v. Burnham*, 20 Wis. 112, 1865; *Covington v. Casey*, 3 Bush (Ky.) 698; *Burnett v. Sacramento*, 12 Cal. 76; *Lexington v. Headley*, 5 Bush (Ky.) 508; *McGuinn v. Peri*, 16 La. An. 326, 1861; *People v. Rochester*, 21 Barb. 656; *Street Case*, 16 La. An. 393; *Litchfield v. Vernon*, 41 N. Y. 123, 1869; *Louisville v. Hyatt*, 2 B. Mon. 177, 1841; *St. Louis v. Clemens*, 36 Mo. 467, 1865; *McKee v. Brown*, 23 La. An. 306; *Delphi v. Evans*, 86 Ind. 90. See, *ante*, chap. XIV. secs. 400-402; *Pittsburg v. Walter*, 69 Pa. St. 365, 1871. This case holds that where the right of the city to collect the assessment is put in issue by a general denial, the *onus* is on the city to prove everything necessary to support the assessment, including the fact of the application by the requisite number of lot owners, as such application is jurisdictional.

Under the Municipal Act of Canada it is provided that local improvements of a certain character "shall not be undertaken by the Council of any city, except under a by-law passed in pursuance of the fourth sub-section of the preceding section, otherwise than on the petition of two-thirds in number and one-half in value of real property to be directly benefited thereby, of the owners of such real property,—the number of such owners and the value of such real property having been *first ascertained and finally determined* in the manner and by the means provided by by-law in that behalf." *Harr. Munic. Man.* (2d ed.) 244. It will be observed that the number of the owners as well as the value of the real property is to be first ascertained and finally determined, in the manner and by the means provided by by-law in that behalf. The court in one case refused to entertain an application to set aside a by-law for local improvements, on the ground that the petition on which the by-law was based was not signed by three-fourths in number and one-half in value of the owners of real property to be benefited by the local improvement, contrary to the determination of the officer of the corporation in that behalf. *In re Michie and the Corporation of the City of Toronto*, 11 U. C. C. P. 379.

² In *Holland v. Baltimore*, 11 Md. 186, 1857, the city was authorized to pave streets when the proprietors of the *majority* of the feet of ground fronting on any street should apply, in writing, therefor. Supposing that a majority of the proprietors had united in the application, but which after-

vided that "the city council should have full power to procure all streets to be improved in any manner they may deem advisable, at the expense of the property owners; and that a petition in writing to the council of the owners of the larger part of the ground between the points to be improved should be sufficient to authorize the council to contract for such improvements: provided, further, that the council, by a vote of all the members elect, may cause such improvements to be made without petition or consent," it was held that an ordinance authorizing such work not enacted at the instance of the property holders, nor on the unanimous vote of the council, was insufficient to fix the liability of the lot owners.¹

§ 640. So, where a statute enacted that "no contract should be made by the head of any department for work or materials for the city, unless for objects authorized by the city council," and the council authorized a department to contract for paving, with the condition that the *contractor be selected by a majority* of the owners of the front to be paved, and who were to pay the cost of the improvement, it was held that a selection of the contractor by a majority of the lot owners was essential to their liability to the contractor to pay for the paving, and that the city, by adopting the work of a paver not thus chosen, could not oblige the lot owners to pay for it.²

wards turned out not to be true, in consequence of one of the signers not being, in law, a proprietor, the city paved a certain street, and, among others, paved in front of the plaintiff's lot, he not having signed the application. After the work had been done, the city sought to enforce the collection of the amount. Plaintiff applied for an injunction to restrain the sale of his lot to pay the assessment. The Court of Appeals held: 1. That if the requisite majority of owners did not apply, the whole proceedings were null and void. 2. That a non-assenting owner might (notwithstanding he did not apply for the writ until after the work was done) have an injunction to prevent the sale of his property to pay the unauthorized assessment. *S. P. Bouldin v. Baltimore*, 15 Md. 18. As to *estoppel* by joining in a petition for the improvement: *Burlington v. Gilbert*, 31 Iowa, 356, but *quare*. See, however, as to *estoppel*: *State v. Hudson*, 34 N. J. Law, 531.

¹ *Covington v. Casey*, 3 Bush (Ky.) 698. *Ante*, sec. 247.

² *Reilly v. Philadelphia*, 60 Pa. St. 467; distinguished from *City v. Wister*, 11 Casey, 427, and *City v. Burgen*, 14 Wright (Pa.) 539.

§ 641. By one section of the organic law of a city it was authorized, on the *petition of two-thirds* of the owners of the abutting property, to make improvement of its streets; by a subsequent section, power was conferred upon the council to order such improvements by a *two-thirds vote of the council*. It was held that although proceedings relative to the improvement were commenced by petition from the property holders, yet, having been ordered by a two-thirds vote of the council, they are valid, although two-thirds of the property owners may not have united in the petition for the improvement—the two-thirds vote of council made the proceedings valid, notwithstanding any defect in the prior proceedings of the petitioners.¹

§ 642. It depends upon the provisions of the special charter or legislative act, whether or not *notice to the abutter* or proprietor is necessary in order to make him liable to pay the expense or cost of the local improvement, and in what manner it shall be given. It is sometimes a condition precedent to the authority to make the assessment and sometimes not. The cases in the notes will illustrate the views of the courts under various enactments.²

¹ *Indianapolis v. Mansur*, 15 Ind. 112, 1860.

In a very recent case, under the general incorporation act of that state (see *ante*, sec. 20, note), it is held that the council of a city may, by a two-thirds vote, without any petition, cause the grade of a street which has been improved, such improvements having been paid for by the owners of the property bordering on such street, and is in good repair, to be changed, and the street as so changed to be improved, and may pay the damages occasioned by the change out of the general revenue of the city, and assess the expense of the improvement against the owners of the adjoining property, or cause such expense to be paid out of such general revenue. *Lafayette v. Fowler*, 34 Ind. 140. *Supra*, sec. 596, note; sec. 619.

² Ordinance requiring owners to repair street, passed without requisite notice, void, and the owners not liable either on contract or *quantum meruit*. *Cowen v. West Troy*, 43 Barb. 48; *Brewtser v. Newark*, 3 Stockt. Ch. (N. J.) 114; *State v. Hudson*, 5 Dutch. 475; reversing S. C., *Id.* 104, *State v. Perth Amboy*, 5 Dutch. 259; *Hewes v. Reis*, 40 Cal. 255. See, also, *Myrick v. La Crosse*, 17 Wis. 442; *Rathbun v. Acker*, 18 Barb. 393, *Risley v. St. Louis*, 34 Mo. 404; *Palmyra v. Morton*, 25 Mo. 598; *Washington v. Mayor*, 1 Swan (Tenn.) 177; *Whyte v. Mayor*, 2 *Id.* 364; *Ottawa v. Railroad Company*, 25 Ill. 43; *Jenks v. Chicago*, 48 Ill. 296; *Himmelman v. Oliver*, 34 Cal. 246.

Notice held not essential to authority to make assessment. *Finnell v.*

§ 643. If the legislature *has required notice* and provided *how it shall be given*, that mode must be pursued.¹ Where the statute provides for a notice by advertisement, or otherwise, a notice by publication is sufficient.² Where, by charter, a city is authorized to levy a special tax on lots for grading, &c., and "to collect the same under such regulations as may be prescribed *by ordinance*," and the ordinance passed in pursuance thereof provided that the resolution of the council levying such tax should be *published* in the official paper of the city, and that thereupon the tax should be due and payable, such publication is necessary to the validity of the tax, and without it the corporation cannot enforce the payment thereof.³ The notice to proprietors to make a local improvement, if there be no charter provision to the contrary, may, it has been held in Missouri, be contained in an ordinance directing the work to be done, of which ordinance the proprietors are bound to take notice.⁴ In a case in Connecticut, the charter

Kates, 19 Ohio St. 405; distinguished from Welker v. Potter, 18 Ohio St. 85. *Requisites of notice* to abutter to make local improvement. Tufts v. Charlestown, 88 Mass. 583; Ottawa v. Macy, 20 Ill. 413; Simmons v. Gardner, 6 Rh. Is. 255; Baltimore v. Bouldin, 23 Md. 328, 1865. Notice to "repave" is not sufficient where the assessment is for "paving," the work being different—as to converse, *quære?* State v. Jersey City, 3 Dutch. (N. J.) 538, 1859. Notice of *assessment*. Lowell v. Wentworth, 6 Cush. 221; Williams v. Detroit, 2 Mich. 560, 1861; Nashville v. Weiser, 54 Ill. 245, 1870; Butler v. Chicago, 56 Ill. 341, 1870; In re Ford, 6 Lansing (N. Y.) 92, 1872. Notice of *confirmation* of report of commissioners. State v. Jersey City, 3 Dutch. 536. Notice of time and place of hearing *objections* to proposed improvement. State v. Jersey City, 2 Dutch. (N. J.) 444; State v. Jersey City, 1 *Id.* 309; State v. Jersey City, 4 Zab. 662; State v. Newark, 1 Dutch. 399; State v. Elizabeth, 2 Vroom, 547. Waiver of such objections. State v. Jersey City, 2 Dutch. 444.

¹ *Ante*, chapter on Eminent Domain, sec. 471; Hewes v. Reis, 40 Cal. 255.

² State v. Jersey City, 4 Zab. (N. J.) 662, 1855. *Ante*, sec. 471.

³ Dubuque v. Wooten, 28 Iowa, 571, 1870.

⁴ Palmyra v. Morton, 25 Mo. 593, 597, 1857.

As to *notice and mode of giving the same* by publication or otherwise, see Simmons v. Gardner, 6 Rh. Is. 255; Scammon v. Chicago, 40 Ill. 146; Risley v. St. Louis, 34 Mo. 404; Hildreth v. Lowell (sewer), 11 Gray, 345; Williams v. Detroit, 2 Mich. 560, 1861; State v. Elizabeth, 1 Vroom, 365; Durant v. Jersey City, 1 Dutch. 309; State v. Jersey City, 4 Zab. (N. J.) 662, in

of a city, in effect, provided that the council might order the adjoining "proprietor" to build a sidewalk, failing to do which, the city might build it at his expense, and the same should be a "lien upon the property and foreclosed as a mortgage;" and it was held that a *prior mortgagee* of the lot owner was not entitled to *notice* to build the sidewalk; that his interest in such a proceeding was necessarily connected with the interest of the mortgagor, and that he was liable to be foreclosed of his right to redeem, unless he paid the expenses of making the sidewalk.' If proper notice is not given, *certiorari* lies to remove the record of the proceedings from before the city council into the proper court, where, if they are substantially defective, they will be quashed.'

§ 644. Authority to a municipal corporation, by its charter, to repair and keep in order its streets, is sufficient, without special grant, to authorize it to *construct drains and sewers*, and, when constructed, the corporation will incidentally possess the power to pass ordinances regulating their use and the price at which private persons may tap them, and also to protect them against injury or invasion.'

which, on *certiorari*, it was held that where a municipal corporation exercises the power to make improvements, and assess the expenses thereof upon the lands benefited thereby, the owners of lands assessed for such improvements, if accessible by reasonable diligence, are entitled to reasonable notice of the meeting of the commissioners for assessing the expenses, and this although the charter is silent on the subject of notice.

¹ *Norwich v. Hubbard*, 22 Conn. 587, 1853.

² *Ottawa v. Railroad Company*, 25 Ill. 43, 1860. Failure, after notice, to object to an assessment before the city council, when it has the power to revise and correct, or annul it and direct a new assessment, will be held in equity, when the party applies for an injunction to restrain the collection of the assessment, as a waiver of all irregularities in the exercise of the power. *Ib. Post*, sec. 738, note; sec. 743, note.

As to *waiver* of objections to validity of assessment. *Nashville v. Weiser*, 54 Ill. 245; *Gardner v. Boston*, 106 Mass. 549; *Hopkins v. Mason*, 61 Barb. 469.

As to remedy by *certiorari* and injunction, see chapter on Remedies Against Illegal Corporate Acts, *post*, sec. 727, *et seq.*

³ *Fisher v. Harrisburg*, 2 Grant (Pa.) Cas. 291, 1854; *Cone v. Hartford*, 28 Conn. 363, 1859. Construction of power; right to change, &c. *Borough v. Shortz*, 61 Pa. St. 399; *Stroud v. Philadelphia*, 15. 255; *State v. Jersey*

§ 645. It has been decided, in Massachusetts, that an authority to make needful and salutary by-laws, or, perhaps, authority to make regulations for the public health, will, in the absence of more specific power, authorize a city to construct a common sewer, and subject the owners of the lots or land abutting, and who use the sewer, to contribute for the expenditure. But this contribution must be apportioned equally and fairly, or it cannot be recovered by the city, either by virtue of the ordinance which imposes it, or on an *indebitatus* count in the absence of express promise. The apportionment should be made upon the value of the *land, independently of the buildings*, and should be settled at the time of the transaction; and an ordinance contravening these principles and requiring every person connecting with the common sewer to pay his just proportion of the expense of making the sewer, having reference, always, to the last *valuation* of such person's *estate* in the assessor's books, previous to the expenditure, is void for inequality and unreasonableness.'

City, 1 Vroom (N. J.) 148; *State v. Jersey City*, 5 Dutch. (N. J.) 441; *State v. Jersey City*, 3 *Id.* 498. *Ante*, secs. 539, 544.

¹ *Boston v. Shaw*, 1 Met. 120, 1840. After this decision the legislature of Massachusetts passed an act (Stat. 1841, chap. CXV. Genl. Stats. 1860, p. 254, sec. 4) giving general authority to cities to construct drains or common sewers, and providing "that every person who enters his particular drain into the main drain or common sewer, or who, by more *remote* means, receives a benefit thereby for draining his cellar or land, shall pay to the city or town his proportional part of the charge of making or repairing the same," &c. A by-law apportioning the assessment for building a drain according to the value of the lands benefited, independently of improvements thereon, was held valid; and the "remote benefit" spoken of by the statute was considered to "mean the increased value given to vacant and unimproved lots by this *privilege* of letting in drains from them in case buildings should subsequently be erected. An assessment upon the proprietors of land so situated that it is, or may be, benefited by the sewer, is just and equal," although it is at the time vacant territory. The proprietor of the land is liable to be charged, "although he never actually uses the drain; perhaps not, if there is no prospect of the possibility of benefit." But it does not invalidate an assessment that the greater part of one lot assessed is lower than the bottom of the sewer, as it might, and probably would, be graded so as to receive as much benefit as other lots. *Downer v. Boston*, 7 Cush. 277, 1871. S. P. and affirming the validity of the act of 1841, above cited, see *Wright v. Boston*, 9 Cush. 238, 1852, and note refer

§ 646. Where the power to *make sewers* was held to be derived as an incident to the power of repairing highways, the court expressed the opinion that the common council were not authorized to construct sewers for the mere private convenience or benefit of particular individuals; and that they could (under such circumstances) "be lawfully made only when the commodiousness of the highway for its proper purposes, and its safety, and the healthfulness of the vicinity require them."¹

§ 647. If there be no special *constitutional limitation*, the cost of making sewers for the public convenience may be directed by the legislature to be paid out of funds provided by general taxation, or to be assessed upon the abutters, or the property specially benefited.²

§ 648. Power to a municipal corporation to make local improvements, though the expense be directed in the constituent act to be assessed upon the property benefited, gives the corporation the implied power to make *general contracts therefor*.³ But as to agreements made between the corporation and a contractor to do the work, the *abutters* or property owners on whom the expense falls are not parties, but are brought into *direct* relation with the proceeding for the local improvement for the first time when the assessment is made. The assessment is a tax levied by the corporation upon property to defray the expense of the improvement, and the suit to collect it (though brought by the contractor under authority given for that purpose) is

ence to People, &c. v. Mayor, &c. of Brooklyn, 6 Barb. 209, which was overruled, 4 N. Y. 419; Patton v. Springfield, 99 Mass. 627.

¹ Cone v. Hartford, 28 Conn. 363, 375, 1859. "Laying out" of sewer defined; what property liable to assessment of benefits; defence to assessment because sewer is a nuisance, see *Id.*

² *Supra*, secs. 596, 597, 598, 599; Stroud v. Philadelphia, 61 Pa. St. 255; Philadelphia v. Tryon, 35 Pa. St. (11 Casey) 401; Hildreth v. Lowell, 11 Gray, 345; Wright v. Boston, 9 Cush. 233; State v. Jersey City, 5 Dutch. (N. J.) 441; Cone v. Hartford, 28 Conn. 363-374. An arbitrary rule apportioning cost according to frontage alone, disapproved. Clapp v. Hartford, 35 Conn. 66; State v. Hudson, 5 Dutch. (N. J.) 104, 1860.

³ Cummings v. Mayor of Brooklyn, &c., 11 Paige, 596, 1845.

not the subject of set-off or counter-claim.¹ But although the property owners are not privies or parties to such contracts, yet, to a certain extent, and in a substantial sense, the municipality is their agent, and since the burden to pay rests upon them, they have a right to insist on a faithful performance of the contract, and the corporate authorities cannot dispense with such performance.²

§ 649. To entitle a *municipal corporation to recover from the abutter the expense of constructing a sidewalk, or other local improvement, it must comply with all conditions precedent*, whether prescribed by charter or ordinance.³ Therefore, if the order of the city council requires the sidewalk to be built *on the side* of a certain street, the city cannot recover of the lot owner an assessment for building a sidewalk several feet from the side of such street.⁴ And where the ordinances of the city provide that sidewalks shall be constructed of such materials as the city council may order, the city cannot recover an assessment unless the

¹ *Himmelman v. Spanagel*, 39 Cal. 389; *Same v. Cofran*, 36 Cal. 411; *Meuser v. Risdon*, *Id.* 239; *Emery v. Gas Company*, 28 *Id.* 345. But a defence good against the city is good against the contractor. *St. Louis v. Clemens*, 36 Mo. 469, 1856. *Ante*, secs. 383, 388, 397, 400. *Post*, sec. 650.

² *Bond v. Newark*, 19 N. J. Eq. 376, 1869; *Lake v. Williamsburg*, 4 Denio, 523; *St. Louis v. Clemens*, 36 Mo. 467. As to the liability of the municipal corporation to the contractor, see chapter on Contracts, *ante*, sec. 400.

³ *Lowell v. Wentworth*, 6 Cush. 221, involving validity of notice of assessment; *Same v. French*, *Id.* 223; *Finnell v. Kates*, 19 Ohio St. 405; *Dorothy v. Chicago*, 53 Ill. 79; *Wilson v. Poole*, 33 Ind. 443; *Himmelman v. Byrne*, 41 Cal. 500; *Hewes v. Reis*, 40 Cal. 255, 1870. Construction of charter as to "temporary" or "permanent" sidewalks, and as to what constitutes an "acceptance" thereof by the city. *Lowell v. Wheelock*, 11 Cush. 391, 1853. If the charter provides that sidewalks may be constructed by the city "at the expense of the lot owner," and points out no specific remedy, a civil action lies to recover the amount. *Lowell v. Wyman*, 12 Cush. 273-276, 1853. "The power of charging the expense of sidewalks on the owners of the adjoining land, is a high power, and is not to be extended by construction." *Per Metcalf, J.*, in *Lowell v. French*, 6 Cush. 223, 224.

⁴ *Lowell v. Wheelock*, 11 Cush. 391, 1853.

council has prescribed the kind of material out of which it should be built.¹

§ 650. In Missouri, in actions to recover the amount charged against a lot for local improvements in front thereof, the liberal doctrine is adopted, that a *substantial compliance* with the law is sufficient, and it is not necessary for the city to prove a strict compliance with directory ordinances on the subject, but the lot owner or defendant may show a neglect of duty by the authorities, and if he was injured thereby it will constitute a defence. If the work has been done in a manner satisfactory to the corporation, and has been accepted by it, a *prima facie* case is made out.²

§ 651. The legislature may provide for a *summary collection* of taxes and assessments, and declare what shall make a *prima facie* case.³ For the payment of street improvements, it was provided by statute, that the city engineer should make an estimate, which, when the council directed it to be paid, became an assessment upon the particular lot or property to which it was chargeable. It was further provided that if it should appear to the council by affidavit that such assessment was not paid, the council should provide for its collection by precept issued by the mayor and clerk. It was contended that this statute was unconstitutional, because it deprived a party of rights without a judicial hearing, and because it invested the council with judicial power. But the court held that inasmuch as the party had the right by appeal to transfer his cause to a judicial tribunal, the objection to the statute was not well

¹ *Id.* The order should appear on the journal of their official proceedings. *Id.* *Ante*, secs. 60, 618.

² *Risley v. St. Louis*, 84 Mo. 404, 1864; *St. Joseph v. Anthony*, 80 Mo. 587, 1860; *St. Louis v. De Nove*, 44 Mo. 136; *St. Louis v. Clemens*, 36 Mo. 467. In an action to recover local assessments, in the absence of proof of fraud, the *acceptance by the corporation* of work it was authorized to contract for, is *prima facie* evidence against the defendant, so far as relates to its completion, and the manner in which it was done. *Municipality v. Guillothe*, 14 La. An. 297, 1859. *Ante*, secs. 386, 387.

³ *St. Louis v. Coons*, 37 Mo. 44, 1865.

taken, and that the issue of the precept was a ministerial, and not a judicial, act.¹

§ 652. The original assessment for a local improvement proving insufficient, the legislature may *constitutionally authorize a re-assessment* and make it operate upon the property benefited, that is, upon all that was originally liable to contribute; and such a law is valid, even against the party purchasing intermediate the assessment and re-assessment. Vested rights are not thereby impaired.²

§ 653. *Mode of Collection.*—If the charter gives to a municipal corporation a specific and complete remedy for the collection of taxes, as by a distress and sale of property, this will ordinarily be regarded as excluding by implication the right to resort to any other mode of enforcing the tax; but where the power to levy the tax is plainly given, the right to collect *by suit* should not be taken to be impliedly denied, unless the intention of the legislature, that the special mode prescribed should be the *only* mode, appears with reasonable certainty. If the specific remedy is full and adequate, such an intention on the part of the law-

¹ *Flournoy v. Jeffersonville*, 17 Ind. 169, 1861; *Id.* 175. *Ante*, sec. 387.

² *Butler v. Toledo*, 5 Ohio St. 225, 1855; *People v. Rochester*, 5 Lans. (N. Y.) 142; *Breevort v. Detroit*, 24 Mich. 322, 1872; *Dill v. Roberts*, 30 Wis. 178; *Mills v. Charleton*, 29 Wis. 400, 1872; *Dean v. Borchenius*, 30 Wis. 236, where the extent of the legislative power is discussed. *Schenley v. Commonwealth*, 36 Pa. St. 29, 1859; *Meuser v. Risdon*, 36 Cal. 239. *Ante*, secs. 45, 46, and notes. Power of legislature to change mode of assessments as to uncompleted local improvements. *Hines v. Leavenworth*, 3 Kansas, 186, 1865. It is essential to the validity of a re-assessment for a local improvement that all the money collected under it shall have been *substantially* expended in the authorized improvement. *Butler v. Toledo*, 5 Ohio St. 225, 1855. Void assessment does not preclude a subsequent valid one. *Himmelman v. Cofran*, 36 Cal. 411, 1868; *Breevort v. Detroit*, 24 Mich. 322, 1872. Further, as to new or re-assessment: *Chicago v. Ward*, 36 Ill. 9; *Gurner v. Chicago*, 40 Ill. 165; *Beygeh v. Chicago*, Supreme Court Illinois, September, 1871, 4 *Chicago Legal News*, 121, not yet officially reported. See, also, *Chicago v. People*, 56 Ill. 327, 1870. Power of city authorities to validate proceedings invalid in the first instance, denied. *Meuser v. Risdon*, 36 Cal. 239; *Municipality v. Botts*, 8 Rob. (La.) 198.

maker would be more readily deduced than it would under other circumstances.'

§ 654. On the principle that *the specific statute mode of collection* must be pursued, it was held, in another case, where the legislature had provided that a tax upon free persons of color removing to a city should be collected by hiring them out, that an ordinance authorizing such persons

¹ *Camden v. Allen*, 2 Dutch. (N. J.) 898, 1857, citing *Pierce v. Boston*, 3 Met. 520, distinguishing *Ohio v. Hibbard*, 3 Ohio 63; *Ohio v. Gazley*, 5 Ohio, 14; and holding that a tax is not a debt or in the nature of a debt, nor liable to set-off; 2 Dutch. 898, *per Green*, C. J. S. P. Denying that taxes are debts, for which, without a statute authority, actions may be maintained, see *Pierce v. Boston*, *supra*; *Shaw v. Pickett*, 26 Vt. 486, cited with approval by *Chase*, C. J., in *Lane County v. Oregon*, 7 Wall. 71, 80, 1868, *arguendo*.

Further, as to *personal liability*: *Oakland v. Whipple*, 39 Cal. 112; *People v. Seymour*, 16 Ib. 332; *Guerrin v. Reese*, 33 Ib. 292; *Litchfield v. Vernon*, 41 N. Y. 123, 1869; *St. Louis v. Clemens*, 36 Mo. 467; *St. Louis v. De Nove*, 44 Mo. 136. In the recent case of *Neenan v. Smith*, 50 Mo. 525, 1872, the case of *St. Louis v. Clemens*, 36 Mo. 467, was overruled as to the right under the charter to a judgment and *general* execution—*Bliss*, J., doubting the power of the legislature to make local assessments a personal charge upon the owner. In the case of *Taylor v. Palmer*, 31 Cal. 240, 1866, the majority of the court held, against a learned and strong dissent, that it was not within the power of the legislature, under the constitution, to make an assessment for street improvements a personal charge against the owner for whatever sum may remain after a lic. on the lot has been enforced. In the learned and strong dissenting opinion of *Sawyer*, J., 1b. 666, the legislative practice and the decisions in other states are extensively referred to, and the authority of the legislature to make an assessment a personal charge, earnestly and ably maintained. *Supra*, sec. 642, *et seq.* *Post*, sec. 659, n.

On the principle that where a statute creates a liability which did not before exist, and gives a special remedy to enforce it, that remedy, and not a common law action must be pursued, street assessments must be collected in the manner provided by the charter or constituent act of the corporation. *Flournoy v. Jeffersonville*, 17 Ind. 169, 1861; 1b. 318. Precept must be duly signed by the proper officer. *Jeffersonville v. Patterson*, 32 Ind. 140. It was held by a divided court (ten senators to eight) that a county could not maintain a bill in equity in the nature of a *creditor's bill*, to enforce the payment of county taxes, where the warrant for the taxes was returned on property whereon to levy. *Court of Errors, Durant v. Supervisors*, 26 Wend. 96, 1841, reversing decree of chancellor and vice chancellor. *Post*, secs. 727-738; *infra*, sec. 660.

to be imprisoned for the non-payment of the tax was void.' So where the organic law of a town gave it power "to levy and collect taxes," and also provided, in another section, that "if any person fail to pay any tax levied on his property, the town collector may recover the same by civil action in the name of the corporation," it was held that the payment of taxes must be enforced by suit and that it was not competent for the corporation to pass an ordinance providing for their collection by seizure and sale, before judgment, since the mode of collection specified in the statute excluded all other modes.'

§ 655. The authorities, however, are not uniform, and in some of the states the view is taken that a tax legally levied and assessed by a municipal corporation pursuant to its charter creates a legal obligation to pay such tax, and that the city can *recover it in an action of assumpsit*, and this although there may be a summary mode of recovery provided for in the ordinance.'

¹ *Cooper v. Savannah*, 4 Geo. 68, 1848.

² *Alexander v. Helber*, 35 Mo. 334, 1864. *Ante*, sec. 273.

³ *Dugan v. Baltimore*, 1 Gill & J. (Md.) 499; *Mayor, &c. v. Howard*, 6 Har. & J. (Md.) 383; *Gordon v. Baltimore*, 5 Gill (Md.) 236, 243; *Eschbach v. Pitts*, 6 Md. 71, 1854. In *Dugan v. Baltimore*, *supra*, *Buchanan*, C. J., delivering the opinion of the court, said: "In the *Mayor, &c. v. Howard*, 6 Har. & J. 383, it was decided by this court, in relation to the 10th section of the act of incorporation, that the giving a remedy by distress or action of debt was cumulative only, and did not take away the action arising by implication, or the legal obligations to pay a claim created by law. The tax for which this suit is brought was imposed by virtue of that act, the imposition and assessment of which created the legal obligation to pay, on which the law raised an *assumpsit*, independent of the notice required by the 5th section of the ordinance, as a foundation for a summary mode of recovery, and unaffected by the omission of the collector to do his duty, which omission, though it caused the loss of the right to collect the tax by distress and sale of the goods, left the right to recover on the original implied *assumpsit* unimpaired—an *assumpsit* raised by the law on the imposition and assessment of the tax, and not to arise on the delivery by the collector of an account of the assessment and tax." *S. P. State v. Southern Steamship Company*, 13 La. An. 497, 1858; *Dunlap v. County*, 15 Ill. 9; *Ryan v. County*, 14 Ill. 83; *Mayor v. McKee*, 2 Yerg. (Tenn.) 167.

Mode of collection. *Bond v. Hiestand*, 20 La. An. 139; *Louisville v. Bank*, 3 Met. (Ky.) 148; *New Orleans v. Graihle*, 9 La. An. 561; *Baltimore v. Chase*, 2 Gill & J. (Md.) 376. *Supra*, secs. 649, note, 654, note.

§ 656. If the charter gives the power to impose taxes, but is *silent respecting the method for their recovery*, the corporation may enforce them, or provide by ordinance for their enforcement by due course of judicial proceedings. In such a case, the authority to collect by *suit* is clearly implied, being necessary in order to make the power to tax available. But the power to levy and collect a tax, whether general or special, does not carry with it the authority to collect *by distress or sale of property*, or in any way more summary than by resort to legal proceedings. The principle of the common law is clear, as we have already seen,¹ that municipal corporations cannot make a by-law (unless the power be plainly and directly conferred) to enforce the payment of fines by distress, sale, or forfeiture of the goods of the party who may have omitted to discharge his legal dues, and the same doctrine extends to taxes, when they are treated as debts. Municipal power to collect by distress and sale cannot be implied because the state collects *its* taxes in this manner. It must be given, if not in express terms, yet by the clearest and most indubitable implication.² Therefore, the power to sell for the non-payment of taxes, general or special, cannot be inferred from an express provision in the charter to the effect that the collection of the taxes provided for therein shall be enforced in such manner as may be provided by the ordinances of the city.³

§ 657. While the power "to levy and collect taxes" will not alone confer the right upon the municipality to col-

¹ *Ante*, chapter on Ordinances, secs. 270-287; 341-355.

² *Bergen v. Clarkson*, 1 Halst. (N. J.) 352, 1796; *Merriam v. Moody*, 25 Iowa, 163, 1868; *Mayor v. Howard*, 6 Har. & J. 383; *Dugan v. Mayor*, 1 Gill & J. 499; *Annapolis v. Harwood*, 32 Md. 471, 1870; *Ham v. Miller*, 20 Iowa, 450; *Camden v. Allen*, 2 Dutch. (N. J.) 398, 1857; *Clerk v. Tucker*, 2 Vent. 132; *New Orleans v. Graihle*, 9 La. An. 561; *Baltimore v. Chase*, 2 Gill & J. (Md.) 378; *St. Louis v. Russell*, 9 Mo. 503, 1845; *St. Louis v. Allen*, 13 Mo. 400, 1850; *McInerny v. Reed*, 23 Iowa, 410, 1867; *Haskell v. Burlington*, 30 Iowa, 232, 1870; *Dubuque v. Harrison*, 34 Iowa, 163, 1872; *Paine v. Spratley*, 5 Kansas, 525. The right to impose a fine or penalty for the non-payment of a tax must be plainly conferred, or it cannot be exercised by the corporation. *Municipality v. Pauze*, 6 La. An. 515, 1851.

³ *Merriam v. Moody*, 25 Iowa, 163; *Paine v. Spratley*, 6 Kansas, 525; *McInerny v. Reed*, 23 Iowa, 410.

lect by a direct sale, yet these words may give such authority in connection with other charter provisions on the same subject which unequivocally and plainly assume and recognize the existence of a power of sale.¹

§ 658. The principle is a familiar one, that the power to sell, when given, must be strictly pursued or the sales are void; and a party claiming title under a corporation tax sale, must, unless the rule is varied by legislative enactment, show that every prerequisite to the exercise of the power has been complied with.²

§ 659. It is undoubtedly a sound proposition, that taxes, whether general or special, are not *liens* upon the property against which they are assessed, unless made so by the

¹ *St. Louis v. Russell*, 9 Mo. 503, 1845; *St. Louis v. Allen*, 13 Mo. 400, 1850. In these cases it appeared that in the charter of St. Louis power was given "to levy and collect taxes," &c., and in another portion of the charter it was provided "that the mayor and city council shall have power, by ordinance, to direct the manner in which property advertised for sale, or sold for taxes, by authority of the corporation, may be redeemed," and it was held that the city might sell property for the non-payment of taxes. Compare, *Merriam v. Moody*, *supra*.

² *Pope v. Headen*, 5 Ala. 433, 1843; *Underhill v. Smith* (publication), *Chip. (Vt.)* 81, 1791; *Bucknail v. Story* (corporation tax deeds as evidence of title), 36 Cal. 67; *Holroyd v. Pumphrey*, 18 How. (U. S.) 69; *Holbrook v. Dickinson*, 46 Ill. 285. Effect of municipal tax deed being made *prima facie* evidence of title. *Id.* *Dubois v. Campau*, 24 Mich. 360, 1872. *Blackwell on Tax Titles*, chap. XXXI. Compliance with law must appear on the face of the proceedings. *Chicago v. Wright*, 32 Ill. 192; *Sharp v. Spier*, 4 Hill (N. Y.) 76, adjudging that a power to sell for taxes did not authorize a sale for a mere *assessment for benefit*; *S. P. Sharp v. Johnson*, 4 Hill, 92. *La Doe v. Chunn*, 1 Blackf. (Ind.) 336, 1825, it was held that express power to a municipal corporation to levy taxes and sell lands for the non-payment of them (the charter being silent as to conveyance to the purchaser), did not include the power to convey; but this view may, perhaps, be considered too strict to be sound. At all events, this would not be law in any but a tax title case. See *Paine v. Spratley*, 5 Kans. 525.

"Without express power given to a municipal corporation, by statute, to become purchaser at an authorized sale of lands [by it] for the non-payment of taxes, it possesses no such power, and a sale to it is void." *Dixon*, C. J., in *Knox v. Peterson*, 21 Wis. 247, 1866; *Sprague v. Coenen*, 30 Wis. 309, 1872. *Relief against illegal taxes and assessments*. *Post*, chap. XXII. *Right to recover back*. *Post*, chap. XXIII.

charter, or unless the corporation is authorized by the legislature to declare them to be liens.¹

§ 660. Where the charter of a city conferred upon it the power "to levy and collect" a special tax for local improvements, and declared such tax to be "*a lien*" upon the real estate upon which it should be assessed, and no mode of collection was prescribed, and no power to collect by sale existed, the court was of opinion that the lien might be *enforced in equity*, and the power "to collect" be exercised by the corporation by a *suit* in its name, but it was held that suit could not be maintained in the name of an assignee of the corporation.² The right of the owner to redeem from

¹ Philadelphia v. Greble, 38 Pa. St. 339; Howell v. Philadelphia, 17b. 471; Allegheny City's Appeal (*lien* of assessment), 41 Pa. St. 60. Authority to a city "to provide, by ordinance or otherwise, for the *prompt* collection of taxes due to the city, and to that end the city shall have power to sell *real* as well as personal property," authorizes it to pass an ordinance declaring taxes to be a lien on realty. Eschbach v. Pitts, 6 Md. 71, 1854, charter of Baltimore. See Dallam v. Oliver, 3 Gill (Md.) 445, 1845. Though a personal action may lie against the owner to recover the amount of a paving tax, yet this does not affect the specific liability of the property on which the tax is a lien or which may be sold to pay it. Eschbach v. Pitts, 6 Md. 71, 1854.

² McNerny v. Reed, 23 Iowa, 410, 1867. In Mayor, &c. of New York v. Colgate, 12 N. Y. (2 Kern.) 140, 1854, the lien of the city was created by statute, and the cumulative right to enforce it as a *mortgage* given, and the lien, it was held, was not discharged by a defective sale *in pais*. See, also, Norwich v. Hubbard, 22 Conn. 587, 1853; Himmelman v. Spanagel, 39 Cal. 389. *Supra*, secs. 637, note, 653.

A contractor, who, as the agent of the city, and by its authority, does paving under a contract with lot owners, will be *subrogated* to the rights of the city as to liens on the adjoining property, and may prosecute a suit in the name of the city for his use against the delinquent property. Philadelphia v. Wistar, 35 Pa. St. 427, 1860. But in Griffing v. Pintard, 25 Miss. 173, it was held that the doctrine of subrogation had no application to the rights and remedies of the state or city against delinquent taxpayers.

Suits for local assessments may be brought in the name of the corporation, although the charter directs that the board of trustees shall do the work and recover; the trustees are but the agents of the corporation. Palmyra v. Morton, 25 Mo. 593, 1857; North Liberty v. St. John's Church, 13 Pa. St. 104.

As to *mode of collecting assessments* for local improvements, and when considered a *personal charge* as well as a *lien* on the property benefited, see

sales for municipal taxes and assessments, as well as from sales under the general tax laws, is favorably regarded by the courts; and statutes giving or extending this right are liberally construed. And it is held by the Supreme Court of Pennsylvania, that the right to redeem is, until the sale is fully consummated by deeds, wholly within legislative control, and that the redemption time may be enlarged after the sale is made and before the purchaser has obtained his deed.¹

Bennett v. Buffalo, 17 N. Y. 383; *Mayor, &c. v. Colgate*, 12 N. Y. (2 Kern.) 140 (assessment for widening street); *Salter v. Reed*, 15 Pa. St. 260; *Philadelphia v. Cook*, 30 *Id.* 56, 63; *Guerrin v. Reese*, 33 Cal. 292; *Des Moines v. Casady*, 21 Iowa, 570; *Gaffney v. Gough*, 36 Cal. 104; *Britton v. Philadelphia*, 32 Pa. St. 387. *Supra*, sec. 653, n.

¹ *Gault's Appeal*, 34 Pa. St. 95, 1859. See *Adams v. Beale*, 19 Iowa, 61.

In Wisconsin a provision in a city charter that no costs shall be recovered against the city in any action brought to set aside a tax sale or to prevent the collection of the tax was held unconstitutional. *Durkee v. Janesville*, 28 Wis. 464. And so a statute requiring payment of the redemption money and interest before being allowed to question the validity of a tax deed was held unconstitutional by the Supreme Court of Illinois. *Reed v. Tyler*, 56 Ill. 288.

CHAPTER XX.

MANDAMUS.

§ 661. This important subject, so far as it falls within the scope of the present work, will be considered in the following order :—

1. Definition and General Nature of the Remedy—secs. 662–664.

2. When the Writ will be Granted or Refused—secs. 665–668.

3. Mandatory and Discretionary Powers as Respects the Remedy by *Mandamus*—secs. 669–673.

4. *Mandamus* as Respects Municipal Elections and Officers—sec. 674, *et seq.* ; To Take Office—sec. 677 ; To Admit to Office—secs. 678–682 ; To Restore to Office—sec. 683.

5. To Obtain Possession and Inspection of Corporate Books and Papers—sec. 684.

6. To Enforce Duties Towards Creditors—secs. 685–693.

7. Application for the Writ—Affidavits—Relator—Rule—secs. 694–697.

8. Form, Direction, and Service of the Writ—secs. 698–704.

9. The Return and Subsequent Proceedings—secs. 705, 706.

10. Peremptory Writ—secs. 707, 708.

11. Attachment—secs. 709–711.

12. Judgment—sec. 712.

Definition and General Nature of the Remedy.

§ 662. At *common law*, the superintending jurisdiction of the King's Bench over all public bodies, including municipal corporations, and over public officers, including the officers of such corporations, is largely exercised by means of the writ of *mandamus*, which is considered in England to be a prerogative writ, and is in style an injunc-

tion in the king's name, commanding the corporation, officer, or person to whom it is directed to perform the specific duty therein commanded. *Mandamus* and informations in the nature of *quo warranto*, are, in England, the principal remedies by which municipal corporations are compelled to observe the requirements of their charter and of the law; and whenever the law has not provided some other adequate or specific remedy to compel or secure the performance of their duties, such performance will be enforced by means of the writ of *mandamus* in favor of the public or of any person having a right to insist upon such performance, and who would be injured by their non-performance.¹ It is, in substance, a civil remedy for the subject, though the name of the king be nominally used.²

§ 663. In *this country* the functions of the writ are fully as extensive as in England, although we have here given more scope to other remedies which often effect practically the same ends.³ It is to the public advantage that municipal corporations and their officers shall be made to perform the duties enjoined upon them by law, and the necessity which has been felt for affording easy remedies against them has led the legislatures and the courts in modern times to improve and liberalize the proceedings by *mandamus*, by relieving them of much of their former

¹ *Commonwealth v. Pittsburg*, 34 Pa. St. 496, 510, 1859; 3 Black. Com. 110; *Rex v. Barker*, 3 Burr. 1267; 1 W. Black. 352; *Rex v. Commissioners*, 1 Term Rep. 148; *People v. Collins*, 19 Wend. 65; Selwyn's *Nisi Prius*, chap. XXVIII. 1077-1100. "A *mandamus* is certainly a prerogative writ, flowing from the king himself, sitting in this court, superintending the police and preserving the peace of this country." *Rex v. Barker*, *supra*, per Lord Mansfield.

² Stephens' *Nisi Prius*, 2291. This author's treatment of the subject of *Mandamus*, as the remedy is applied in England, is highly satisfactory.

³ See, *post*, chaps. XXII. XXIII. "*Mandamus*," says Mr. Justice Thompson, in commencing his valuable opinion in the *Commonwealth v. Allegheny County*, 37 Pa. St. 277, 279, 1860, "is a high prerogative and remedial writ, the appropriate functions of which are the enforcement of duties to the public, by officers and others, who either neglect or refuse to perform them. It follows, therefore, that those to whom it may be appropriately directed owe some duty to the public, and are under obligation to perform it, and for the enforcement of which there is no other specific legal remedy."

artificial and technical character.' Accordingly, "it is," says a high legal authority, "well settled that a *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now considered as a prerogative writ. The right to the writ, and the power to issue it, have ceased to depend on any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It is a writ to which every one is entitled, where it is the appropriate process for asserting the right he claims.'"

§ 664. *Mandamus and injunction* are, in their nature, different remedies, and in general are not concurrent or interchangeable.' A *writ of mandamus* may be styled an injunction at law or a mandatory writ in a *legal* proceeding, commanding in the name of the sovereign authority the *performance* of a specific affirmative act. A *writ of injunction* belongs to a court of equity, and usually issues to *prevent the doing* of some specific act. Where *mandamus* is the appropriate remedy, it cannot be substituted by a bill in equity praying an injunction—as, for example, to compel a municipality to levy a tax to pay a judgment against it.'

¹ *Rex v. Barker*, 3 Burr. 1265; *Sikes v. Ransom*, 6 Johns. 279; *Ex parte Turner*, 5 Ohio, 542.

² *Per Taney*, C. J., in *Commonwealth of Kentucky v. Dennison*, Governor, &c., 24 How. (U. S.) 66, 97, 98, 1860; *Kendall v. United States*, 12 Pet. 615; *Kendall v. Stokes*, 3 How. 100; *Ex parte Fleming*, 4 Hill (N. Y.) 581; *State v. Bailey*, 7 Iowa, 390; *Bryan v. Cattell*, 15 Iowa, 338, *per Wright*, J.; *Commonwealth v. Allegheny County*, 32 Pa. St. 218, 1858; *State v. Kirkley*, 29 Md. 85, 1868; *Wilkinson v. Bank*, 8 Rli. Is. 22.

³ *Walkley v. Muscatine*, 6 Wall. 481, 1867. Thus *mandamus*, and not a bill in equity, is the proper remedy against the officers of a corporation to compel them to register a conveyance of shares. *Cooper v. Dismal Swamp Canal Company*, 2 Murphy (North Car.) 195. *Remedy in equity*. Post. chap. XXIII. secs. 727-738. So an *injunction*, and not *mandamus*, was considered to be the proper remedy to prevent the erecting, by the trustees, of a school-house on a site selected in violation of law; but *mandamus* was regarded as the proper remedy to compel the trustees to carry out the decision of the superior school officer, on appeal, in relation to establishing a school-house for the district. *State v. Custer*, 11 Ind. 210, 1858.

⁴ *Walkley v. Muscatine*, 6 Wall. 481, 1867. *Infra*, sec. 685. See *State v. Kirkley*, 29 Md. 85, 110, 1868, in which it was held that *mandamus* was a proper remedy by a city to compel the delivery to it, by a building com-

When Granted or Refused.

§ 665. A writ of *mandamus* will be *granted against municipal corporations* and their officers whenever they refuse or unreasonably neglect to perform any duty clearly enjoined upon them by charter or statute or law, and there is no other specific legal remedy adequate to enforce the right of the public, or the specific legal right of the relator.¹ "Whenever," says Mr. Justice *Strong*, now holding a seat on the Supreme Bench of the United States, adopting the doctrine of the English law, "there is a clear legal right in the relator, a corresponding duty in the defendants, and the want of any other adequate and specific remedy," a writ of *mandamus* is the appropriate process.²

§ 666. If the statute prescribe a *specific remedy*, particularly if adequate in its nature, such a remedy is ordinarily, if not always, exclusive of *mandamus*, which will not in such case be granted; but if no particular remedy be given, and there is no other plain and effectual mode of relief, *mandamus* is proper in all cases where it is adapted

mittee who were acting without legal authority, of the plans and specifications of the city hall, and thus to restrain them in the discharge of the duties of their supposed office.

As to *mandamus* and *injunction*: *Prescott v. Duquesne* (duty in respect to wharf), 48 Pa. St. 118; *School Directors v. Anderson*, 45 Pa. St. 388; *State v. Graves*, 18 Md. 351; *Neuse River Company v. Commissioners*, 6 Jones (North Car.), Law, 204; *State v. Custer*, 11 Ind. 210; *People v. Salomon*, 46 Ill. 415; *Same v. Saine*, 51 *Ib.* 39. *Infra*, sec. 666. *Post*, chap. XXII. as to legal and equitable remedies.

¹ *Hall v. Selectmen*, 39 N. H. 511, and cases cited by *Bellows, J.*; *Hawkins v. County Commissioners*, 14 Ind. 521; *Strong's Case*, Kirby (Conn.), 345; *Treat v. Middleton*, 8 Conn. 243; *Commonwealth v. Allegheny County*, 32 Pa. St. 218, 1858; *State v. Kirkley*, 29 Md. 85, 1868; *Angell & Ames*, secs. 709-712, and cases cited; *St. Luke's Church v. Slack*, 7 Cush. 226; *People v. Supervisors, &c.*, 10 Wend. 363; *People v. Supervisors, &c.*, 4 Seld. 317; *State v. Cincinnati*, 19 Ohio, 178; *State v. Wood County*, 17 Ohio, 184; *Ball v. Lappius*, 3 Oregon, 55, 1868; *Sedberry v. Commissioners, &c.*, 66 Nor. Car. 486, 1872.

² *Commonwealth v. Pittsburg*, 34 Pa. St. 496, 509, 1859; *Stephens' Nisi Prius*, 2202; *Rex v. Nott. Water-works Co.*, 6 A. & E. 355; *Indianapolis, &c. R. R. Co. v. State*, 37 Ind. 489, 1871.

to enforce the right and duty in question.' And it has repeatedly been held, both in England and in this country, that where there is a clear legal right in the relator, the writ will not be refused merely because there is a remedy in equity, or a remedy at law, if not adequate to the purpose, or because the officers or adverse party may be prosecuted criminally for neglect of duty.'

§ 667. The well established general rule is, as above stated, that the writ of *mandamus* will only lie to give effect to a *clear legal right*; but if there be a reasonable or fair doubt respecting the right of the public or of the relator to this form of remedy, *the writ* will be granted, and the question of the right considered on the return.' And however clear the legal right of the relator or applicant for the writ may be, the writ cannot be sustained if there is a

¹ *Ottawa v. People*, 48 Ill. 233, 1868.

² Willcock, 356, pl. 40-44, and cases cited; *Regina v. Bristol Dock Co.*, 2 Queen's B. 64; *People v. Mayor*, 10 Wend. 393, 1833; *Commonwealth v. Allegheny County*, 32 Pa. St. 218, 1858; *Stephens' Nisi Prius*, 2306; *Rex v. Railway Company*, 2 B. & A. 646; *Ex parte Robins*, 7 Dowl. 566; *Indianapolis, &c. R. R. Co. v. State*, 37 Ind. 489, 1871; *Hardcastle v. Railroad Co.*, 32 Md. 32, 1869. *Post*, chap. XXII.

It has been sometimes said, but perhaps without sufficient reflection, that a *remedy by injunction*, if ample, will prevent a resort to, or induce the court in its discretion to deny, a *mandamus*. *State v. Custer*, 11 Ind. 210, 212, *per Hanna, J.*; *People v. Salomon*, 46 Ill. 415. But if the suit in chancery is not of a nature to do such complete justice as a proceeding by *mandamus*, the pendency of such a suit in equity will not prevent the court from awarding a *mandamus*. *People v. Salomon*, 51 Ill. 39, 1869; *Calaveras County v. Brockway*, 30 Cal. 325. *Supra*, sec. 664. If the relator has a bill pending in equity on which full relief can be had, *mandamus* will be denied. *Hardcastle v. R. R. Co.*, 32 Md. 32, 1869.

A statute provided that a creditor of a county should be entitled to the amount due him "in the county levy, or to a recovery thereof, with costs, by *action of debt* against the officer refusing to levy the same;" and it was held by the Court of Appeals of Virginia, that this right to an action against the officers was such a specific legal remedy as to deprive the creditor of the right to a *mandamus* to compel the levy of the tax. *Justices v. Munday*, 2 Leigh (Va.), 165, 1830; but *quære?* See *Amy v. Supervisors*, 11 Wall. 136, 1870, referred to *infra*, sec. 691.

³ Willc. 356, pl. 41; *People v. Stevens*, 5 Hill (N. Y.) 616; *State v. Warren, &c. Company*, 3 Vroom (N. J.) 439; *Regina v. Heathcote*, 10 Mod. 49; *People v. Ransom*, 2 Comst. (N. Y.) 490. *Post*, sec. 694, n.

clear, ample, and adequate remedy by an ordinary action at law.¹ But since the proceeding by *mandamus* has been assimilated to ordinary proceedings, the relator, if otherwise entitled, should not be denied a resort to this remedy on the ground that he can sue at law, unless it appears that this latter remedy is just as adequate and effectual as the other.

§ 668. Thus, where the *salary or fees of an officer of a municipal or public corporation* may, like other debts, be recovered by an action at law against the corporation, this,

¹ *People v. Supervisors*, 11 N. Y. (1 Kern.) 563; *People v. Mayor*, 10 Wend. 393. It has been said that the rule in the text is "not universally true in relation to corporations and ministerial officers." *McCullough v. Mayor of Brooklyn*, 23 Wend. 459. And in that case, where it appeared the common council had neglected its duty in omitting to issue a warrant to collect a tax, *Bronson, J.*, said, that though an action on the case would *perhaps* lie in favor of the plaintiff, who would be entitled to the money when collected, yet a *mandamus* would be a more appropriate remedy; which, according to the commentary of *Nelson, J.*, is only equivalent to saying, "if the remedy by action be doubtful, a *mandamus* will lie." 11 N. Y. (1 Kern.) p. 573, 574. See, also, *People v. Supervisors, &c.*, 10 Wend. 363, 366, where it is said, "If an action lies in this case, then a *mandamus* should be refused." *People v. Brooklyn*, 1 Wend. 318, 325; *Boyce v. Russell*, 2 Cow. 444; *People v. Mayor of New York*, 25 Wend. 680; *People v. Stevens*, 5 Hill, 616.

That mandamus will not lie where there is an adequate remedy by statute or by an ordinary action at law: *Commissioners, &c. v. Lynch*, 2 McCord (South Car.) 170, 1822; *Crandall v. Amador*, 20 Cal. 72; *Johnson County v. Hicks*, 2 Ind. (Carter) 527, 1851; *Township Trustees v. State*, 11 Ind. 205, 1858; *Baker v. Johnson*, 41 Maine, 15, 1856; *People v. Edmunds*, 15 Barb. 529; 19 Barb. 468; *State v. McCrillus*, 4 Kansas, 250; *Railroad Company v. State*, 25 Ind. 177; *Justices v. Munday*, 2 Leigh (Va.) 165; *People v. Supervisors*, 11 N. Y. 563. So under the *English common law procedure* act of 1864, sec. 68, *mandamus* will not be sustained if there be any other remedy equally adequate and effective. *Bush v. Beavan*, 1 Hurl. & Colt. 500.

Mandamus will not lie where a party has an appeal or the right to a writ of error, which will give adequate relief. *Ex parte Nelson*, 1 Cow. 417; *State v. Mitchell*, 2 Const. Rep. (South Car.) 703, 1815; *Williams v. County Judge*, 27 Mo. 225; *Rex v. Benchers of Gray's Inn*, Douglas, 339. *Post*, chap. XXII.

Where the writ of *certiorari* was taken away, the court refused to indirectly interfere to bring the proceedings under review by *mandamus*. *Rex v. Yorkshire, &c.*, 1 A. & E. 563. *Post*, chap. XXII. secs. 739-743.

ordinarily, is the remedy, and not *mandamus*;¹ but if the officer cannot sue the corporation, he may, where entitled, compel payment by means of this writ,² unless another is in possession under color of right, in which case the title to the office cannot ordinarily be determined on *mandamus*, or in any collateral proceeding.³ So in a case in which it appeared that the state of New York had issued bills of credit to the amount of £200,000, which sum was apportioned among the several counties of the state and paid over to each county to be loaned out to its citizens on mortgage security; and where it was provided by statute that if any deficiency on foreclosure should exist, the *supervisors* should raise the same as the ordinary county charges are levied and collected, it was decided that the remedy of the state, where the supervisors omitted to perform this duty, was by *mandamus* against them, and not by *action* against the county, as the county was only liable in the way pointed out by the statute.⁴

¹ *People v. Thompson*, 25 Barb. 73; *Ex parte Lynch*, 2 Hill (N. Y.) 45, 1841; *People v. Mayor, &c. of New York*, 25 Wend. 680; *Boyce v. Russell*, 2 Cow. 444, 1824. *Ante*, sec. 168. *Reynolds v. Taylor*, 43 Ala. 420, 1889.

² *Baker v. Johnson*, 41 Maine, 15, 1856; *People v. Edmonds*, 15 Barb. 529; *Commonwealth v. Johnson*, 2 Binney (Pa.) 275; *People v. Supervisors*, 32 N. Y. 473. But it will not lie to control a discretion as to the amount to be allowed. *People v. Supervisors*, 1 Hill, 362; *People v. Mayor, &c.*, 9 Wend. 508. *Compensation of municipal officers: Ante*, sec. 168. In North Carolina, while it is conceded that the court "will not, ordinarily, at least, interfere by *mandamus* where there is another specific legal remedy" (*State v. Jones*, 1 Ire. 134), yet it is doubted whether, when the legislature authorizes one set of public officers—as, for example, a school committee—to make contracts, and directs that the employees shall be paid by another public officer, upon an order from the first, there can be any other specific legal remedy than that afforded by *mandamus*. *Per Battle, J.*, in *Taylor v. School Commissioners*, 5 Jones (Law) 98, 1857.

³ *Winston v. Mosely*, 35 Mo. 146, 1864; *State v. State Auditor*, 34 Id. 375; followed, *State v. Auditor*, 86 Mo. 70; *People v. Brennan*, 45 Barb. 457. *Infra*, secs. 680, *et seq.* 716; *post*, chaps. XXI. XXII.

⁴ *People v. Supervisors*, 10 Wend. 363, 1833; *People v. Supervisors*, 16 Johns. 59, 1819.

The doctrines of the text, as to *mandamus*, may be illustrated by a brief reference to some of the adjudged cases, in which the writ has been held to be the proper remedy to compel the performance of a public duty. Thus, *mandamus* lies to compel public officers, on the *division of towns*, to *apportion*

Mandatory and Discretionary Powers.

§ 669. Powers conferred upon municipal corporations are, as we have heretofore seen, of two general classes—the

the money between them pursuant to the directions of the statute. *People v. Marsh*, 2 Cow. 485, 1824. *Ante*, secs. 84, 86, 37, 43, and 127-129.

To pay for authorized public improvements within a municipality, the legislature may direct the local officers to *issue its bonds*, and upon their refusal to issue them, the duty may be compelled by *mandamus*. *People ex rel. McLean v. Flagg*, 11 Am. Law Reg. 80, decided by the New York Court of Appeals, 46 N. Y. 401. This case was distinguished in the recent case of the *People v. Bachelier*, decided by the Court of Appeals in 1873, 8 Albany Law Journal, 120, in which it was held that the legislature could not compel a municipal corporation to become a stockholder in a railway company and issue its bonds in payment for the stock without its consent. The opinion of *Grover, J.*, refers to many of the previous cases, and admits that they establish that "municipal corporations may be compelled to enter into contracts for an exclusive public purpose," but not "when the purpose is private," and he treats this purpose as private; and did not consider the decision of the United States Supreme Court in *Olcutt v. Supervisors*, Dec. Term, 1872 (*ante*, sec. 105a), as conclusive of the question before the court. It is noticeable that the case of *Atkins v. Randolph*, 31 Vt. 226, is cited, which was characterized by Chief Justice *Denio* in the manner heretofore noticed. *Ante*, sec. 43, note; sec. 44; chap. XIX.; *People v. White*, 54 Barb. 622, 1869; 42 Cal. 449; *Ib.* 541.

Mandamus will lie to compel a city to make an assessment, directed by an act of the legislature, to pay for buildings pulled down to open a public street, or to make and collect street assessments. *Shoolbred v. Charleston*, 2 Bay (South Car.) 63, 1796; *Himmelman v. Coffran*, 36 Cal. 411; *Sinton v. Ashbury*, 41 Cal. 525, 1871; *Wilson v. Berkstresser*, 45 Mo. 283, 1870; *State v. Keokuk*, 9 Iowa, 438; *Chapin v. Osborn*, 29 Ind. 99; *Rex v. Canal Company*, 1 M. & S. 32; *Regina v. Canal Company*, 8 Dowl. P. C. 623. So the writ will lie to a city council to *compel prosecution of a local improvement* commanded by statute to be made. *People v. Common Council of Brooklyn*, 22 Barb. 404. So, also, to compel *commissioners of the poor* to discharge duties imposed on them, if there be no adequate remedy at law. *Commissioners, &c. v. Lynah*, 2 McCord (South Car.) 170, 1822; *State v. Mitchell*, 2 Const. (South Car.) 708; *Rex v. Bank of England*, Douglas, 506. *Post*, sec. 743.

As the writ lies to enforce public rights, it will be granted to compel the mayor to perform his duty as a *presiding officer*, after default in that respect. *Rex v. Everett*, Cas. Temp. Hardw. 261; *Rex v. Williams*, 2 M. & S. 141, Willc. 357, pl. 46. *Ante*, secs. 147, 148, 208, 210. And to compel the proper officer of the city to *issue a license* to one entitled thereto. *East St. Louis v. Wider*, 46 Ill. 351. See *Hall v. Supervisors*, 20 Cal. 591.

Mandamus will lie to compel county commissioners to make a record of

one mandatory, the other discretionary.' Discretionary powers are not, unless in extraordinary and exceptional instances, to restrain gross abuse, subject to judicial control;'

their action in a matter affecting individual rights, so that an appeal may be taken if desired. Commissioners of Warren County v. State, 15 Ind. 250. And against an officer, to compel him to *record a deed or paper*. Strong's Case, Kirby (Conn.) 345; People v. Collins, 7 Johns. 549, 1811; *Ex parte* Goodell, 14 Johns. 325, 1817. And against commissioners of a county, to compel them to *receive and file a petition* for a change of the boundaries of the county, as required by law. Hawkins v. County Commissioners, 14 Ind. 521. So it will lie to compel the officer having custody of the *corporate seal*, to affix it to any document to which it is the duty of such officer to put it. Tapping on *Mandamus*, 96; 3 Blackst. Com. 110. As for example the seal to a county warrant. Prescott v. Gonser, 34 Iowa, 175, 1872.

Where a statute is *mandatory*, enjoining upon the mayor and aldermen the performance of a duty, such as to appoint commissioners to *discharge a public duty* connected with the navigation of a public stream, *mandamus* will lie. Mayor, &c. v. State, 4 Geo. 26, 1848. In Georgia, a city marshal may be compelled, by *mandamus*, to perform his official duty to *restore property levied on for taxes* to the claimant on receiving the bond and security required by statute. Mitchell v. Hay, 37 Geo. 581, 1868. A *mandamus* is the proper remedy for the state to compel an officer—*e. g.* a county auditor—to perform a public duty, in which the state is interested—*e. g.* to *issue his tax duplicate* without adding an *illegal* per cent. Hamilton v. State, 3 Ind. (Port.) 452, 1852.

County—Duty as respects paupers. Where a statute provided that when any person, not a pauper, "shall fall sick and die in any county in this state, not having money to pay his board, medical aid, or burial expenses, it shall be the duty of the County Court to make such allowances therefor as shall seem just," it was held that this extended to persons of this class within the limits of an incorporated place, the corporation charter being silent on the subject; and that the county could be compelled, by *mandamus*, to make a proper allowance when such expenses have been incurred. Gunn v. County, 3 Ark. 427, 1840.

¹ *Ante*, chap. V. sec. 62; Commonwealth v. Pittsburg, 34 Pa. St. 496, 516, *per Strong, J.*; County Commissioners v. Duckett, 20 Md. 468; *Id.* 449; Rex v. Hastings, 1 D. & R. 148; Baltimore v. Marriott, 9 Md. 160; Meyer v. Carolan, 9 Texas, 250; Regina v. Dock Company, 2 Eng. Railway Cases, 599; Sights v. Yarnalls, 12 Gratt. (Va.) 292; Goodrich v. Chicago, 20 Ill. 445; Railroad Company v. Napa County, 30 Cal. 435; Ottawa v. People, 48 Ill. 283, 1868; People v. Brooklyn, 22 Barb. 404; Supervisors v. United States, 4 Wall. 435, 444, 1866, where Mr. Justice *Swayne* distinguishes the two classes of powers; Rex v. Bailiffs, &c., of Eye, 2 D. & R. 172, construing the words "shall be lawful."

² *Ante*, chap. V. sec. 58; *post*, chaps. XXII. § 689, XXIII.

but duties imperatively enjoined may, as we have just shown, be enforced by *mandamus*.

The general rule of law is this: If the inferior tribunal, corporate body, or public agent or officer has a *discretion*, and *acts and exercises it*, this discretion cannot be controlled by *mandamus*. But if the inferior tribunal, body, officer, or agent *refuse to act* in cases where the law requires them to act, and the party has no other legal remedy, and where, in justice, there ought to be one, a *mandamus* will lie to set them in motion, to compel action; and, in proper cases, the court will settle the legal principles which should govern, but without controlling the discretion of the subordinate jurisdiction, body, or officer.¹

§ 670. Thus a *mandamus* will be issued by the proper federal court to an officer of the federal government, com-

¹ *Giles's Case*, 2 Stra. 881; *Rex v. Nottingham*, Sayer, 217; *Hull v. Supervisors*, 19 Johns. 259, 1821; *Gourley v. Allen*, 5 Cow. 644; *People v. Supervisors*, 12 Johns. 414; *Ex parte Nelson*, 1 Cow. 417; *Ex parte Bailey*, 2 Cow. 479; *Elkins v. Athearn*, 2 Denio, 191; *People v. Supervisors*, 1 Hill (N. Y.) 50; *Ib.* 362; *Ex parte Turner*, 5 Ohio, 542, 543, *per Lane, J.*; *McKean v. Louisville*, 18 B. Mon. 9; *Commonwealth v. Henry*, 49 Pa. St. 530; *Kennedy v. Washington*, 3 Cranch C. C. 595; *State v. Robinson*, 1 Kansas, 188, 220; *Magee v. Supervisors*, 10 Cal. 376; *State v. Wilmington City Council*, 3 Harring. (Del.) 294; *Michigan City v. Roberts*, 34 Ind. 471, 1870.

The principle in the text is well illustrated by the case of *The King v. Bristol Dock Company*, 6 R. & C. 181, in which the dock company was authorized by parliament to make a floating harbor in the city, and required "to make such alterations and amendments in the sewers of said city as might or should be necessary in consequence of the floating of said harbor," and it was decided that the directors might by *mandamus* be commanded, in the words of the act, "to make such alterations," &c., but the nature of the alterations could not be specified, as this was a matter committed by parliament to the judgment and discretion of the directors of the company.

Mandamus held not to lie to enforce the award of a contract to the lowest bidder. *State v. Board of Education*, 24 Wis. 683; *State v. Commissioners*, 18 Ohio St. 386; *Welch v. Supervisors*, 23 Iowa, 199; *People v. Contracting Board*, 27 N. Y. 878; 46 Barb. 254; 33 N. Y. 382; *Commonwealth v. Henry*, 49 Pa. St. 530; *People v. Brennan*, 39 Barb. 651; *Boren v. Commissioners*, 21 Ohio St. 311; *State v. Barlow*, 48 Mo. 17, 1871; *Dean v. Borchenius*, 30 Wis. 236, 1872. As to rights of lowest bidder: *Ante*, chap. XIV. sec. 388-392.

manding him to do a mere *ministerial act*, but not one which involves the exercise of judgment and discretion.¹

§ 671. So where there is a duty *purely ministerial*, and *not discretionary*, devolved by law upon the public officers of a state, and the refusal or neglect to perform the duty affects a specific legal right, the person thereby injured may have a *mandamus*. This doctrine, under the conditions just stated, has been very generally considered to be applicable to the *executive head* of the state; but it should obviously be limited to cases where the right of the relator is plain and the duty of the executive clearly ministerial, and not discretionary. The leading cases on this subject are referred to in the note.²

¹ *Kendall v. United States*, 13 Pet. 524; *Decatur v. Paulding*, Secretary of Navy (to compel defendant to pay pension), 14 Pet. 497, 1840; *Reeside v. Walker*, Secretary of Treasury, 11 How. 272; *United States v. Guthrie*, Secretary of Treasury, 17 *Id.* 284; *Same v. Seaman*, *Id.* 225; *Brashear v. Mason*, 6 How. 97; *United States v. Land Commissioner*, 5 Wall. 563; *Ex parte De Groot*, 6 Wall. 497; *The Secretary v. McGarrahan*, 9 Wall. 298, 312, 1869.

A state court cannot issue a *mandamus* to an officer of the United States. *McClung v. Silliman*, 6 Wheat. 598.

² When the act neglected to be done by *the governor of a state* is purely ministerial, not discretionary, and affects a specific private right, a *mandamus* may issue. *State v. Governor of Ohio*, 5 Ohio St. 528, 1856. Thus *the governor* will, by *mandamus*, be compelled, in a proper case, to issue commission to an officer presenting legal evidence of his election. *State ex rel. Loomis v. Moffitt*, 5 Ohio, 358, 362, *per Hitchcock*, J.; *State v. Governor of Ohio*, 5 Ohio St. 528, 1856. *Contra*: *Hawkins v. Governor*, 1 Pike (Ark.) 570, 1839; *State v. Governor*, 1 Dutch. (N. J.) 381, 1856, in which the right to issue a *mandamus* to the governor, in any case, is denied. *People v. Bissell*, 19 Ill. 229; *State v. Warmouth*, 22 La. An. 1, 1870. But it has been elsewhere held that the governor or executive officers of a state may, by means of this writ, be compelled to perform a mere ministerial duty or act in which individuals have an interest. *Low v. Towns*, 8 Geo. 360, 1850; *Middletown v. Lowe*, 80 Cal. 596; *Magruder v. Swann*, 25 Md. 173; *Cotten v. Ellis*, 8 Jones (North Car.) Law. 545; *State v. Wrotnowski*, 17 La. An. 156; *Biddle v. Willard*, 10 Ind. 62, 1857; *Bryan v. Cattell*, 15 Iowa, 538; *Nichols v. Comptroller*, 4 Stew. & Port. (Ala.) 154, 1838; *Pacific Railroad Company v. Governor*, 23 Mo. 358; *Chamberlain v. Sibley*, 4 Minn. 309. In *Maurin v. Smith*, 5 Am. Law Reg. (N. S.) 680, and S. C., 8 Rh. Is. 192, *mandamus* was held not to lie to compel the governor to perform one of his statutory duties as commander-in chief. *Mandamus* lies against the *auditor of state* or comptroller of public accounts where the right of the plaintiff is

§ 672. On the principle that *official discretion cannot be judicially interfered with by mandamus*, this writ will not lie to control the discretion of commissioners to determine the site for a *county seat*, they having been directed to locate it as near the center of the county as a suitable location could be obtained, and having made a selection, although it was admitted that it would be granted to compel them to act.¹ So where the statute vests the county commissioners with the power to determine *when a court house and jail* shall be erected by the county, *mandamus* will not lie to compel them to erect those buildings, or, if the contract has been let, to proceed with the erection thereof.²

§ 673. So, where the *building of bridges, or the making of local improvements, is a discretionary power* entrusted to public or municipal corporations, and the proper authorities thereof have, in good faith, decided according to their judgment, *mandamus* will not be issued to compel them to a different course.³ But a provision in a municipal

clear and no other remedy is provided, and the duty is not discretionary. *Divine v. Harris*, 8 Mon. (Ky.) 440; *State v. Graham*, 24 La. An. 429, 1872; *Nichols v. Comptroller*, 4 Stew. & Port (Ala.) 154, 1833; *Fowler v. Pierce*, 2 Cal. 165; *Towle v. State*, 3 Fla. 202. *To state treasurer. State v. Dubuclet*, 24 La. An. 16.

¹ *State v. Bonner*, Busbee (North Car.) Law, 257, 1853. As to county seat elections, and the remedy for frauds therein, by *mandamus* and in equity, see *People v. Wiant*, 48 Ill. 263, 1868; see, also, *People v. Salomon*, 51 Ill. 39.

² *Ex parte Black*, 1 Ohio St. 30, 1852. *Post*, sec. 695, 1.

³ *State v. Freeholders*, 3 Zab. (N. J.) 214, 1851; *Michigan City v. Roberts*, 34 Ind. 471, 1870; *State v. Police Jury*, 22 La. An. 611, 1870. *Post*, chap. XXIII.

The judgment and discretion of the town supervisors as to the necessity of *bridges* and repairs thereon cannot be controlled by *mandamus* when the statute makes *them* the judges of the necessity. *State v. Supervisors*, 16 Wis. 613. But the duty to *repair and rebuild bridges* may, when it is not discretionary and is clear, be enforced by *mandamus*. *Howe v. Crawford County*, 47 Pa. St. 361; *Treat v. Middleton*, 8 Conn. 243; *In re Municipality, &c.*, 12 Upper Can. Q. B. 523; *Queen v. County, &c.*, 7 Upp. Can. Law J. 266; *Brander v. Judges, &c.*, 5 Call (Va.) 548; *Ottawa v. People*, 48 Ill. 233; *People v. Supervisors*, 1 Hill (N. Y.) 50. County Commissioners were, by statute, "*authorized*" annually, at their June session, to levy a tax "for the construction and maintenance of a free turnpike road through their

charter that the council shall "cause the *streets to be kept in repair*" has been held not to confer a discretionary power, but to enjoin a duty, the performance of which may be compelled by *mandamus*.¹ The performance of this duty is sometimes enforced by indictment, but more frequently by private action for damages.²

§ 674. *Mandamus as respects Municipal Elections and Officers*.—In a previous chapter the powers of municipal corporations as to *elections and officers therein* have been considered;³ and it may be here stated as a general proposition that *mandamus* is ordinarily the appropriate remedy to compel them and their officers, in case of refusal or neglect, to perform their duties in these respects.⁴ In England the writ lies, and is constantly issued, to compel the corporation to elect a mayor and other corporate officers according to their duty;⁵ but if the office is full by the

county:" held, that it "authorized," but did not require, the levy of the tax, and, no private rights having intervened, a *mandamus* to levy the tax was refused. *Commissioners v. Sandusky County*, 1 Ohio St. 149, approving and distinguishing *Mayor v. Furze*, 3 Hill (N. Y.) 612. In England it has been held that *mandamus* will not be issued to determine which of two parishes is liable to repair a road, under local acts. *Regina v. Turnpike Roads*, 12 A. & E., 427. See *Rex v. Commissioners of Roads*, 2 Term R. 232.

¹ *Hammar v. Covington*, 3 Met. (Ky.) 494, 1861; *Uniontown v. Commonwealth*, 34 Pa. St. 293, 1859. Distinguished, *Michigan City v. Roberts*, 34 Ind. 471, 1870; *R. R. Co. v. State*, 37 Ind. 489. *Ante*, chapter on Streets, sec. 579, note.

² See, *post*, chap. XXII.; also, chap. XXIII., as to liability for defective streets. *Post*, secs. 747, 748.

³ *Ante*, Chap. IX., on Municipal Elections and Officers.

⁴ *Id.* *Lamb v. Lynd*, 44 Pa. St. 624; S. C., *Brightley's Election Cases*, 624-631, and note of the learned editor.

⁵ *Rex v. Cambridge*, 4 Burr. 2008; *Rex v. Tregony*, 8 Mod. 113; *Rex v. Abingdon*, 1 Ld. Raym. 561; *Rex v. St. Martin*, 1 Term R. 149; *Rex v. Liverpool*, 1 Barnard. 83; *Rex v. Woodrow*, 2 Term R. 732; *Rex v. Scarborough*, 2 Stra. 1180; *Rex v. Leyland*, 3 M. & S. 184; *Rex v. Thetford*, 8 East, 270; *Rex v. Norwich*, 1 B. & Ad. 310; Willc. 357, pl. 45; *Id.* 361, pl. 56; *Tapping on Mandamus*, 165; *Rex v. York*, 4 T. R. 699; *Stephens' Nisi Prius*, 2293-2295; *Rex v. Winchester*, 7 A. & E. 215; *Regina v. Pembroke* (corporation of), 8 Dowl. P. C. 302; *Regina v. Leeds* (Mayor of, &c.), 7 A. & E. 963; *Grant on Corp.* 204, 208, 213, 219.

possession of an officer *de facto* under color of right, a *mandamus* will not, as hereafter explained, be granted to proceed to a new election until the person in possession has been ousted upon proceedings in *quo warranto*.¹ "The court," says Mr. *Willcock*,² "will grant a *mandamus* to proceed to an election of a new mayor, *after the charter day has passed* without such election, where the former mayor having the power to do so holds over, and refuses to convoke an assembly³ for that purpose, unless the charter restrains the right of electing to a particular time;" and "it will be granted for the election of bailiffs, chamberlains, coroners, and other annual officers, although not the chief officers of the corporation."

§ 675. So, in this country it has been decided that an *election for municipal officers may be held after the charter day*, and that a *mandamus* may be granted to compel the proper officers to give notice thereof.⁴ And the writ will lie in the name of the state on the relation of a voter to compel a municipal council to hold or appoint a *special election*, according to the charter, to fill a vacancy in their body, when this is a duty enjoined upon them; and to justify the writ there need not be a positive refusal; unreasonable delay, manifesting an intention not to perform the

¹ *Rex v. Bankes*, 3 Burr. 1454; *Rex v. Cambridge*, 4 *Id.* 2011; *Rex v. Radford*, 1 East, 80; *Rex v. Truro*, 3 B. & A. 592; *Rex v. Derby*, 7 A. & E. 419; *Rex v. Hiorns*, *Id.* 960; *Id.* 966; *Rex v. Colchester*, 2 Term R. 259. *Infra*, secs. 678-682. *Post*, sec. 716.

² Willc. 357, pl. 45; *Id.* 361, pl. 56; *Rex v. Cambridge*, 4 Burr. 2011; *Rex v. Scarborough*, 2 Stra. 1180; *Rex v. Norwich*, 1 B. & Ad. 310; *Angell & Ames*, sec. 700.

³ As to Corporate Assembly, see *ante*, chap. X.

If municipal corporations neglect to hold elections as empowered by the remedial statute of 11 Geo. I., chap IV., by which they are authorized to supply the vacant offices of mayor, they may be compelled to fill them by *mandamus*. *Rex v. Oxford*, Cas. Temp. Hardw. 178; *Rex v. Cambridge*, 4 Burr. 2011; Willc. 360.

As to right of officer to hold over, see authorities last cited, and also, *ante*, chap. IX. sec. 156.

⁴ *People v. Fairbury*, 51 Ill. 149, 1869. *Ante*, sec. 157, *et seq.*; *Tapping on Mandamus*, 165. *Post*, sec. 722.

duty, is sufficient.¹ So where it is made by charter the duty of the select and common councils *to assemble in joint meeting* to appoint certain corporate officers, not elected by the people, and the time for the meeting is fixed by law or ordinance, it is not discretionary in one of these bodies to refuse to meet with the other, and if it does so refuse, its members may be compelled by *mandamus*.²

§ 676. *Municipal councils*, as we have before seen, are often invested with the control of municipal elections, and are *made canvassers and judges of the result*, and they may be compelled to perform their duties in this respect by *mandamus*.³

¹ *State v. Rahway*, 38 N. J. Law, 410, 1868. *Vacancies in municipal offices. Ante*, sec. 161.

² *Lamb v. Lynd*, 44 Pa. St. 336, 1863; S. C., *Brightley's Election Cases*, 624, and note. *Reed*, J., concurred because this was a necessary result of *Kerr v. Trego*, 47 Pa. St. 632; S. C., *Brightley's Election Cases* 632, where he dissented. *Ante*, chap. X. sec. 222. Further, as to *contested election cases*: *Brightley's Election Cases*, 270, 455, 466, 656. *Post*, chap. XXI. on *Quo Warranto*.

³ *Ante*, chap. IX. sec. 139 *et seq.*; *Lamb v. Lynd*, *Brightley's Election Cases*, 624, 630, and note; S. C., 44 Pa. St. 336.

Mandamus will lie to compel *election canvassers*, whose duties are ministerial, to act, but not to control their judgment. *Magee v. Supervisors*, 10 Cal. 376; *State v. County Judge*, 7 Iowa, 186; *Rice v. Smith*, 9 Iowa, 570; *State v. Bailey*, 7 Iowa, 390. *Ante*, sec. 143, note. *Moses on Mandamus*, chap. XIII.; *Brightley's Election Cases*, 261, 300, 305, 423, 434; *State v. Marston*, 6 Kansas, 524, 1870.

It will also lie, upon the relation of any voter or tax-payer interested, to compel an election officer to *announce the result* of an election. *People v. Salomon*, 46 Ill. 415. So it will lie to a returning officer, board of examiners, or managers of an election, or council, to compel them to *give a certificate of election* to the person elected. *State v. The Judge, &c.*, 13 Ala. 805, 1848; *Strong*, Petitioner, 20 Pick. 484, 1838; *O'Ferrall v. Colby*, 2 Minn. 180; *State v. Loomis*, 5 Mam. (Ohio) 358, 362; *Rex v. York*, 4 Term R. 669. Such certificates are important since they are *prima facie* evidence of title, though not conclusive in the trial of contested elections. *Kerr v. Trego*, 47 Pa. St. 292, 1864; S. C., *Brightley's Election Cases*, 632, 641, and note; *Carpenter v. Ely*, 4 Wis. 420; *Brightley's Election Cases*, 258, 314, 320, 435. So *mandamus* lies to a municipal corporation to compel it to act according to its duty upon the *sufficiency of sureties* offered by a person elected to a municipal office. *Ante*, sec. 154, n. *Mandamus* lies in favor of relators duly elected to a municipal office to compel the mayor or proper officer to

To Take Municipal Office.

§ 677. In England, on the principle heretofore adverted to, 'if a corporator, elected to a corporate office, neglect or refuse, without sufficient legal excuse, *to serve*, he may be compelled by *mandamus*, but it is doubtful, as before suggested, how far this doctrine is applicable in this country.'

To Admit to Municipal Office.

§ 678. In appropriate cases, *mandamus* will lie to compel the proper officers of a municipal corporation to *admit to the possession* of his place one elected to any municipal or corporate office.' *Mandamus* is not considered, in England, the proper remedy to try the right to a public or municipal office, and a *mandamus* to admit gives no title to the person admitted, but it enables him to try or enforce his right; and if there is another remedy open to the applicant, as, for instance, an information in the nature of *quo warranto* (which lies where the adverse claimant or officer is in possession), a *mandamus* will not be granted. But it will be granted, says Mr. Willcock, "where *quo warranto* does not lie, although the office be already full, as otherwise in many cases the applicant would be without remedy." In cases where *mandamus* lies, the applicant will be refused the writ unless he shows a *prima facie* title.'

administer the oath of office to them. *Ex parte* Heath, 3 Hill (N. Y.) 42, 1842. *Mandamus* to compel corporation to remove an officer. *Ante*, sec. 189, n.

¹ *Ante*, sec. 162; *Rex v. Bedford*, 1 East, 80; *Rex v. Leyland*, 3 M. & S. 184; Willc. 867. When the writ lies to compel an officer to take upon himself the duties of his office. *Ante*, sec. 162; Tapping on *Mandamus*, 189.

² *Ante*, secs. 162, 165.

³ *State v. Rahway*, 33 N. J. Law, 111, 1868; Willc. 868, pl. 74; Angell & Ames on Corp. sec. 703.

⁴ *Regina v. Leeds*, 11 A. & E. 512; *Rex v. Winchester*, 7 A. & E. 215; *Rex v. Sawyer*, 10 B. & C. 486; *Regina v. Slatter*, 11 A. & E. 502; *Regina v. Derby* (councillors of), 7 A. & E. 419; *Same v. Hiorns*, *Id.* 960; *Frost v. Chester*, 5 E. & B. 581; Willc. 873, pl. 87. The *requisites of returns to writs of mandamus to admit* are stated by Mr. Willcock, at pp. 413-417, and by Angell & Ames, sec. 722.

⁵ Willc. 868, pl. 74.

§ 679. In this country the same general principles are recognized, although there is, as we shall see, some difference of opinion as to the scope of the remedy by *mandamus* where there is an officer or adverse claimant in possession. Thus *mandamus* lies to compel the city council to admit a councilman duly elected to that office.¹ But on the ground that *mandamus* was not a proper proceeding to try the right to a public office, the court declined to make an order to show cause, in a case where the relator claimed to have been elected by the common council to the office of assessor, and also claimed that the council wrongfully deprived him of his office by refusing to count the vote of one of the members in his favor.²

§ 680. The adjudged cases in this country agree that *quo warranto*, or an information or proceeding in the nature of a *quo warranto*, is the appropriate remedy, when not changed by charter or statute, for an *usurpation of a municipal franchise*, as well as for unauthorized usurpations and *intrusions into municipal offices*.³ When no special tribunal, with exclusive and final power to settle contested titles to office, is provided, the regular method is by *quo war-*

¹ State v. Rahway, 33 N. J. Law, 111, 1868.

² People v. Detroit, 18 Mich. 338, 1869.

³ Reynolds v. Baldwin, 1 La. An. 165; followed, Cochran v. McCleary, 22 Iowa, 75, 1867; State v. Ramos, 10 La. An. 420; People v. Matteson, 17 Ill. 167; People v. Stevens, 5 Hill (N. Y.) 616, 1843; Hullman v. Honocomp, 5 Ohio St. 237, 1855. *Ante*, sec. 210. *Post*, secs. 714-716.

Legality of election and title to office cannot [ordinarily] be tested by *bill in chancery*. *Ib.* But see, in exceptional instances, Kerr v. Trego, 47 Pa. St. 292, 1864; cited *ante*, sec. 213; S. C., Brightley's Election Cases, 632. *Remedy by injunction*. Brightley's Election Cases, 578, 623, and cases cited.

The *title to office* must be tested on *quo warranto*, and cannot be questioned collaterally. People v. Fletcher, 2 Scam. (Ill.) 487; Bonner v. State, 7 Geo. 473, 1849, and cases cited. People v. Kip, 4 Cow. 382, note; *Ib.* 358, 1822; Lewis v. Oliver, 4 Abb. Pr. Rep. 121; St. Louis County Court v. Sparks, 10 Mo. 117, 1846; Winston v. Moseley, 35 Mo. 146. In North Carolina the remedy to try title to office is *quo warranto*. Howerton v. Tate, 66 North Car. 231 and note. *Ante*, chap. IX. sec. 141; *ante*, chap. X.; *post*, sec. 716. In Pennsylvania, *quo warranto* lies to try the right to *all* offices, military as well as civil. Commonwealth v. Small, 27 Pa. St. 81; Field v. Commonwealth, 32 Pa. St. 478.

ranto;' and the instances are exceptional when this may be done on *mandamus*. If another is commissioned, and in actual discharge of the duties of the office, an adverse claimant to the office is not entitled to a *mandamus*, but must resort to *quo warranto*; but it was admitted that where the office is attempted to be held under an appointment which is merely colorable and void, *mandamus* would lie.* In Texas it is held that *mandamus* will lie to recover or to be admitted to the possession of an office to which the claimant has been elected and commissioned.* In Georgia, and some of the other states, the English rule is maintained, namely, that where a person is an officer *de facto*—that is, is in the exercise of the duties of an office under a *prima facie* right or color of title—the remedy to admit another having a lawful claim is not by *mandamus*, but by an information in the nature of a *quo warranto*.*

§ 681. But, in a case in Maryland,* in which the claimant sought not only the removal of the incumbent, but the possession of the office for himself, the objection was made that *quo warranto*, and not *mandamus*, was the proper

* *Ante*, chap. IX. secs. 141-144; *People v. Detroit*, 18 Mich. 338.

* *State v. Dunn, Minor* (Ala.) 46, 1821; *State v. Auditor*, 36 Mo. 70, 1865, *per Wagner, J.*; *People v. Scrugham*, 20 Barb. 302. *Post*, sec. 716.

* *Lindsley v. Luckett*, 20 Texas. 516.

* *Bonner v. State*, 7 Geo. 473, 1849; *State v. Delieesseline*, 1 McCord (South Car.) 52; *State v. Dunn*, 1 Minor (Ala.) 46; *People v. Corporation of New York*, 3 Johns. Cas. 79; *Rex v. Mayor of Colchester*, 2 Term R. 259; *S. P. St. Louis County Court v. Sparks*, 10 Mo. 117, 1846. "*Mandamus* will not be issued to admit a person to an office while another is in under color of right." *State v. Auditor*, 36 Mo. 70, *per Wagner, J.* *Mandamus* will not lie to turn out one officer and to admit another in his place. *People v. Matteson*, 17 Ill. 167; *People v. Head*, 25 Ill. 325; *People v. Hilliard*, 29 Ill. 413, 1862. But a groundless, colorless claim to an office, or a pretended intrusion into or retention of it, will not, as against a person duly elected and acting, be sufficient to drive the informant to a *quo warranto*, and he may have a *mandamus* to compel such person, though he was the informant's predecessor in office, to deliver up the books and property belonging to the office. *People v. Kilduff*, 15 Ill. 492, 1854; *Rex v. Cambridge*, 4 Burr. 2008; *Borough of Tintagel* (case of), 2 Stra. 1003; *Rex v. Winchester*, 7 A. & E. 215. When *mandamus* is the proper remedy to determine the right to an office. *Grant on Corp.* 216. *Post*, secs. 715, 716.

* *Harwood v. Marshall*, 9 Md. 83, 1856.

remedy to try the title to the office ; but the Court of Appeals held that the objection was not well taken, and that the plaintiff need not resort to *quo warranto* as preliminary to *mandamus*, as this might prove inadequate, by reason of the delay it would occasion. The court was of opinion that *mandamus* to compel the defendant to surrender to the petitioner the office was the only complete remedy, since "under the *quo warranto* information the judgment might remove the occupant, but would not install the claimant." And the court further held that *mandamus* might issue although the office was filled by the defendant, who claimed title. It admitted the conflict of decisions on this point, but regarded *mandamus* as particularly applicable to the cause before the court.

§ 682. There is much to recommend the views of the Maryland court in the case just referred to, since the delays of resorting to *quo warranto* are such, in consequence of the short terms of our elective officers, as generally to amount to a denial of justice. Before the *quo warranto* proceedings can be determined, the term of the claimant frequently expires, and a judgment in his favor is a barren victory.* It is agreed that where, for any reason, *quo warranto* will not lie, and there is no other adequate remedy provided, the right to a disputed office may be settled on *mandamus*.† Looking at the question in view of our short official terms, we should say that where the effect of compelling a resort to *quo warranto* would be unreasonably to delay the decision of the disputed right (which concerns not

* *Ib.*; citing Strong's Case, 20 Pick. 497; Dew's Case, 3 Hen. & Munf. (Va.) 1, 23. See, also, in Massachusetts, Howard v. Gage, 6 Mass. 462.

† Where a judgment of ouster in *quo warranto* has been rendered in an inferior court and the defendant has duly appealed and filed the necessary *supersedeas* bond, *mandamus* from the superior court to the inferior court to execute the judgment of ouster will not be awarded, although the term of office will expire before the appeal can be regularly heard in the appellate tribunal. United States v. Addison, 22 How. (U. S.) 174, 1859. If the appellant fails to prosecute his appeal with effect, it is intimated by Mr. Justice McLean that the *supersedeas* bond would be available in such a case to the appellee or defendant in error as an indemnity. *Ib.* p. 185. *Infra*, sec. 712.

* Willc. 373, pl. 87; People v. Stevens, 5 Hill (N. Y.) 616, 1843.

only the individuals, but the public), the court would be justified in interfering by *mandamus*, so far, at least, as to see that the incumbent is actually a *bona fide* possessor of the place, and that there is a real dispute and fair doubt as to which party has the legal title.¹

To Restore to Municipal Office.

§ 683. The power of municipal corporations *to remove officers* has been treated in a former chapter;² and the corporation, as we have seen, may, in some cases be compelled by *mandamus* to exercise this power.³ Where a municipal officer or member of a municipal council has been illegally suspended or illegally removed, he is, in general, entitled to a *mandamus to be restored*.⁴ The doctrine has been sanctioned, that where an officer of a corporation has been *irregu-*

¹ *Post*, chap. XXI. When *conflicting claims to office* may be settled on *mandamus*, discussed, but not determined, in the *People v. Stevens*, 5 Hill (N. Y.) 616, 1843; see *Rex v. Cambridge (Mayor, &c.)*, 4 Burr. 2008; *People v. Scrugham*, 20 Barb. 302; *People v. Kilduff*, 15 Ill. 492; *Banton v. Wilson*, 4 Texas, 400; *Lindsly v. Luckett*, 20 Texas, 516; Angell & Ames, sec. 706. In *Ex parte Heath*, 3 Hill (N. Y.) 42, the question whether the relators were duly elected to municipal offices was incidentally determined on *mandamus*, but the question as to the "proper remedy was not made." 5 Hill, 629, *per Bronson, J.* But where *mandamus* is resorted to in order to try which of two persons has been elected to an office, and indeed in every such proceeding except *quo warranto*, the regular determination of the board of canvassers is conclusive. *People v. Stevens*, 5 Hill (N. Y.) 616, where court refused application of relator to compel, by *mandamus*, predecessor in office to deliver books and papers, because relator's title to the office was not clear. *People v. Vail*, 20 Wend. 12, 14. *Post*, sec. 716.

If there be no doubt as to the validity of an election, the court will not interfere by *mandamus* in the first instance, but will leave the parties to their remedy by *quo warranto*. *Commonwealth v. Commissioners*, 5 Rawle (Pa.) 75.

² *Ante*, chap. IX. secs. 177-194; Willc. 375; Grant on Corp. 243, 416.

³ *Ante*, sec. 189, note.

⁴ *Ante*, sec. 186, note; sec. 193; Duffield's Case, Bright. Elec. Cas. 646; *Mayor of Durham's Case*, 1 Sid. 33; Bac. Abr. title "*Mandamus*;" Grant on Corp. 247-250; Willc. 378; *State v. Common Council*, 9 Wis. 254; *Den v. Judges*, 3 Hen. & Munf. (Va.) 1. Where county commissioners removed a clerk, the court ordered a peremptory *mandamus* to restore the party removed to his office, because the record did not show the ground of

lurly removed, yet if the court see good cause for the removal, that is, if they see that by regular proceedings another amotion for the same cause would follow, and that it is the *duty* of the corporation to exercise the power to amove, the peremptory writ may, in the discretion of the court, be refused, to compel his restoration.¹

To Enforce Delivery and Inspection of Books and Papers.

§ 684. *Mandamus*, as we have before seen, is a proper remedy for the duly elected officer of a municipal corporation to obtain possession of the *seal, books, papers, and records* appertaining to such office, from his predecessor;² but, as elsewhere stated, the courts will not, in general, try by *mandamus* whether one person is entitled to an office actually filled by another, under commission or color of right.³ In this country, the records, public books, and by-

removal. *Street v. County Commissioners*, Breese (Ill.) 25. Where a corporate body strikes off the name of a member without notice to him, a *mandamus* to restore him will be granted. *Delacy v. Neuse, &c. Company*, 1 Hawks (North Car.) 274, 1821; *Duffield's Case*, Bright. Elec. Cas. 646. *Mandamus* will not lie to restore one to an office to which he is not entitled, though he may have been illegally removed. *Major v. Randolph*, 4 Watts & Serg. (Pa.) 514. *People v. Metropolitan Police Board*, 26 N. Y. 316.

¹ *Rex v. The Mayor, &c. of Axbridge*, Cowper, 523; *Rex v. The Mayor &c.*, 2 Term R. 181, 182, *per Ashhurst, J.*; *Rex v. Bristol*, 1 D. & R. 389; S. C., 5 B. & Ald. 731; *Ex parte Paine*, 1 Hill (N. Y.) 665, 667, 1841, *per Cowen, J.*; *Rex v. Bank*, 2 B. & Ald. 620. *Ante*, sec. 174, n., sec. 192. Mr. Willcock (Munic. Corp. 379, pl. 100) stated the doctrine thus: A peremptory *mandamus* to be restored "will not be granted to a public officer who admits that he was justly but irregularly amoved;" citing *Rex v. The Mayor, &c.*, Cowper, 523. See, also, *Rex v. Campion*, 1 Sid. 97; *Rex v. Oxon*, 2 Salk. 429; *Rex v. Slatford*, 5 Mod. 366; *Rex v. Ipswich*, 2 Ld. Raym. 1240.

Requisites of returns to a mandamus to restore. Willc. 417-424; Angell & Ames, secs. 723-725, 729.

² *Ante*, sec. 239; *People v. Kilduff*, 15 Ill. 492, 1854; *Tapping on Mandamus*, 50, 94; 3 Bl. Com. 110; *Rex v. Buller*, 8 East, 388; *Rex v. Hopkins*, 1 Q. B. 161; *Rex v. Greene*, 6 A. & E. 549. *Relator, who?* *Bates v. Plymouth*, 14 Gray, 163. *Post*, sec. 722.

³ *People v. Head*, 25 Ill. 325; *People v. Hilliard*, 29 Ill. 413, 1862; *supra*, secs. 673-682; *Tapping on Mandamus*, 27, 28; *State v. Pitot*, 21 La. An. 336,

laws of municipal corporations are of a public nature, and if such a corporation should refuse to *give inspection* thereof to any person having an interest therein or, perhaps, for any proper purpose to any inhabitant of the corporation, whether he had any special or private interest or not, a writ of *mandamus* would lie to command the corporation to allow such inspection, and copies to be taken, under reasonable precautions to secure the safety of the originals.¹

To Enforce Duties Towards Creditors.

§ 685. *Mandamus* is one of the principal remedies by which municipal and public corporations are compelled to *perform their duties towards their creditors*. The power of the legislature over these corporations is such that it may require them to levy a tax to pay creditors, and obedience to such requirement may be enforced by *mandamus*.² The power of municipal corporations to make contracts and to create liabilities has been before considered,³ and this authority imposes the duty of providing for the payment of obligations and liabilities in the special mode prescribed by law, and if no such mode is prescribed, then by the levy and collection of taxes under the provisions of the charter or other legislative act.⁴ Whether the duty to provide for

1869; *Grant on Corp.* 216, and authorities cited. Lies against *mere usurpers*, without color of right. *Kimball v. Lamprey*, 19 N. H. 215.

¹ *Ante*, sec. 240. Further, as to inspection: 1 Greenl. Ev. secs. 471-478; Angell & Ames, sec. 707; Tapping on *Mandamus*, 52, 95; *Rex v. New-castle*, 2 Stra. 1223; *Rex v. Babb*, 8 Term R. 580; *Rex v. Shelley*, *Id.* 143; *Rex v. Lucas*, 10 East, 235; *Rex v. Tower*, 4 M. & S. 162.

² *Commonwealth v. Pittsburg*, 34 Pa. St. 496, 1859; *Newman v. Justices*, 5 Sneed (Tenn.) 695, 1854; *ante*, chap. IV. secs. 35, 36, 41; *Darlington v. Mayor, &c. of New York*, 31 N. Y. 164; *Commonwealth v. Allegheny County*, 37 Pa. St. 277; *Bassett v. Barbur*, 11 La. An. 672; *Von Hoffman v. Quincy*, 4 Wall. 535, 1866. *Supra*, sec. 664.

³ *Ante*, chap. XIV. on Contracts. *Post*, chap. XXIII.

⁴ *Commonwealth v. Pittsburg*, 34 Pa. St. 496, 510, 1859; *Commonwealth v. Allegheny County*, 27 Pa. St. 277, 1860. In this case, *Thompson, J.*, says: "The authority to create a debt implies an obligation to pay it, and where no special mode is provided, it is implied that it is to be done in the ordinary way, by the levy and collection of taxes." 37 Pa. St. p. 290. *Ante*, chap. I. sec. 9, note. See chap. XIX. on Taxation. *Hasbrouck v. Milwaukee*, MS. 1870.

the payment of the liabilities of the corporation be specially enjoined, or whether it results from the general powers and nature of the corporation, it may, in all proper cases, be equally enforced by *mandamus*.¹

¹ *Id.* See, also, *Walkley v. Muscatine*, 6 Wall. 481; *The Mayor v. Lord*, 9 Wall. 409; *Commonwealth v. Allegheny County*, 32 Pa. St. 218, 1858; *Commonwealth v. Perkins*, 43 Pa. St. 400; *Maddox v. Graham*, 2 Met. (Ky.) 56, 1859; *Lexington v. Mulliken*, 7 Gray (Mass.) 280, 1856; *State v. Milwaukee*, 20 Wis. 57, 1865; *Von Hoffman v. Quincy*, 4 Wall. 535, 1866; *Butz v. Muscatine*, 8 Wall. 575, 1869; *Galena v. Amy*, 5 Wall. 705, 1866; *Pegram v. County*, 64 North Car. 557, 1870; *Soutter v. Madison*, 15 Wis. 80; *Flagg v. Palmyra*, 33 Mo. 440; *Columbia Co. v. King*, 13 Florida, 451; *Brown v. Crego*, 32 Iowa, 496; *State v. Milwaukee*, 25 Wis. 122, 1869; *State v. Burbank*, 23 La. An. 318, 1870. *Hasbrouck v. Milwaukee*, MS. 1870.

Form of alternative writ in favor of creditor. *Commonwealth v. Pittsburgh*, 34 Pa. St. 496.

In *Mississippi*, *mandamus* is the proper remedy of the creditor to compel the county board of police to proceed to audit the claim, and when audited the party is entitled to a county warrant on the treasurer, and if there is no money in the treasury, *mandamus* will lie to compel the board to levy a tax to pay the warrant. *Board, &c. v. Grant*, 9 Sm. & Marsh. 77, 1847; *Madison County Court v. Alexander*, Walker Rep. 523, 1832; *Carroll v. Board of Police*, 28 Miss. 38.

In *Tennessee*: *Newman v. Scott Co.*, 1 Heisk. 787.

In *Arkansas*: *Gunn v. County*, 3 Ark. 427.

In *Wisconsin*, by construction of the statute, judgments against incorporated cities are to be enforced, not by execution, but the amount is to be made part of the next tax roll and collected as other taxes: *Crane v. Fond du Lac*, 16 Wis. 196, 1862. But judgments in that state may be enforced by *mandamus* to levy and collect the requisite tax to pay them. *State v. Milwaukee*, 20 Wis. 87; *State v. Beloit*, *Id.* 79; *Soutter v. Madison*, 15 Wis. 80.

In *Iowa*, the remedy of a creditor against county corporations (*State v. County Judge*, 5 Iowa, 380) and upon ordinary municipal indebtedness is by suit, and not by *mandamus*, where the indebtedness is in the original form, as a simple contract debt. *Coy v. Lyons*, 17 Iowa, 1; *State v. Davenport*, 12 Iowa, 335.

In *Pennsylvania*, it is held that an ordinary execution cannot be issued against a municipal corporation; that none of the property of such a corporation, whether real or personal, "necessary for governmental purposes," can be seized or sold thereon, and that the proper remedy for the judgment creditor is the *mandamus execution* provided by statute, which commands the corporation treasurer to pay the amount of the judgment out of any unappropriated moneys in his hands, and which must be obeyed by the officer whether the council have made an appropriation therefor or not. These writs have priority in the order in which they are served. *Monaghan*

§ 686. We have seen that it is a general rule, relating to the writ under consideration, that it will not lie if there be a plain and complete remedy by the more ordinary processes of the law; and this principle has been applied to the mode of compelling municipal corporations to meet their liabilities and obligations. Therefore, it has been generally, but not uniformly, held, if the creditor may bring suit against the corporation and obtain a judgment, which may be enforced and rendered effectual by ordinary execution, that *mandamus* will not lie to compel payment,

v. Philadelphia, 28 Pa. St. 207, 1857. *Infra*, sec. 687, note. And in the same state, it has been held that an action would not lie upon the resolution of a municipal corporation directing the mayor to issue certificates of debt to an individual, the only remedy being by *mandamus*. *Commonwealth v. Lancaster*, 5 Watts (Pa.) 152. *Mandamus* to county commissioners to draw orders on county treasury refused where the treasury has no money therein with which the orders can be paid. *Price v. County Commissioners*, 1 Whart. (Pa.) 1; *S. P. Commonwealth v. County Commissioners*, 2 *Ib.* 286. Remedy of a claimant against a county in Pennsylvania—when by action and when by *mandamus*, see *Hester's Case*, 2 Watts & Serg. 416; *Commonwealth v. Commissioners, &c.*, 16 Serg. & Rawle, 317; *Lyon v. Adams*, 4 *Ib.* 443; *Wilson v. Commissioners*, 7 Watts & Serg. 197.

Remedy by mandamus to compel payment of county orders or warrants or audited claims. *Coleman v. Neal*, 8 Geo. 560; *ante*, chap. XIV. on Contracts; *State v. Mount*, 21 La. An. 352; *Connor v. Morris*, 23 Cal. 447; *Keller v. Hyde*, 20 Cal. 593; *Cuthbert v. Lewis*, 6 Ala. 262. *Mandamus* does not lie, in New York, to compel supervisors to audit and allow the amount of a tax illegally assessed and collected from the relator. *People v. Supervisors, &c.*, 11 N. Y. (1 Kern.) 563. In *Iowa*, it is held that *mandamus* will not lie to compel the county auditing officer to act by either allowing or disallowing a claim against the county, for the reason that the claimant has, by an action in the courts, a plain and adequate remedy. *State v. County Judge*, 5 Iowa, 380. *Mandamus* lies to a city treasurer to compel the performance of the ministerial act of *issuing a warrant for an audited or approved bill*. *State v. Mount*, 21 La. An. 352, 369; *Reynolds v. Taylor*, 43 Ala. 420; *People v. Brennan*, 39 Barb. 536. *Mandamus* will not lie to an auditor of a county or other public corporation to draw an order when the amount has not been ascertained, and when he has by law no power to fix the amount. *Putnam County v. Allen County*, 1 Ohio St. 322; *Burnett v. Auditor, &c.*, 12 Ohio, 57; *State v. County Auditor*, 19 Ohio, 116; *State v. Mount*, 21 La. An. 352; *People v. Flagg*, 17 N. Y. 584. *Ante*, sec. 406.

When debt is payable out of a *particular fund*, the remedy is, ordinarily, by *mandamus*, and not by action. *Insane Hospital v. Higgins*, 15 Ill. 185. See *ante*, chap. XIV. on Contracts. Liability to be sued, see *post*, chap. XXIII. *Ante*, sec. 413.

in advance of judgment obtained, and this view is the one most consistent with principle, when the matter stands wholly unaffected by legislation.¹ When judgment is obtained, and there is no property subject to execution out of which it can be made, *mandamus* will lie, and is the

¹ *People v. Clark County*, 50 Ill. 213, 1869; *State v. County Judge*, 5 Iowa, 380, 383; *Coy v. Lyons*, 17 Iowa, 1; *State v. Davenport*, 12 Iowa, 335; *Lexington v. Mulliken*, 7 Gray, 280, 1856; *State v. Clay Co.*, 46 Mo. 231, 1870. See and compare *Buck v. Lockport*, 6 Lansing (N. Y.) 251, 1872. *Supra*, secs. 666-668.

In *Chicago v. Hasley*, 25 Ill. 595, 1861, the question was presented, whether, at common law, or in the absence of an express statute authorizing it, a judgment against a municipal corporation could be enforced by an ordinary *fiery facias*. The majority of the court were of opinion that such a writ was not allowable, and quashed it, holding that the only proper course for the creditor to pursue, after refusal to pay, was by *mandamus*, to compel payment, or the levy of a sufficient tax for that purpose. The conclusion that their property is exempt from sale on execution is based upon the propositions that such corporations are created for public and civil purposes; that to pay their debts, they are clothed with the power to raise money by taxation; that their property is possessed for corporate purposes, and not in the way in which it is possessed by individuals; that to levy upon and sell such property—for instance, water works, fire engines, public buildings, the revenues, &c.—would destroy the corporation, or, at least, the means of enabling it to discharge its proper functions.

As to exemption of municipal revenues from judicial seizure: *Ante*, secs. 64, 65. As to sale of municipal property on execution, see *ante*, chap. XV. sec. 446. *Ante*, secs. 614, 615.

In the absence of an express provision of law to that effect, creditors of a municipal corporation cannot, outside of the New England states, resort to the individual property of the inhabitants for the purpose of discharging a judgment against the corporation. Their remedy is by *mandamus* to compel the corporation to pay the debt by levying a tax; but the failure of the corporation to make the levy, or of the inhabitants to pay the tax, does not render their individual property liable to be taken by the creditor. *Horner v. Coffey*, 25 Miss. 434, 1858. In this case it appeared that the town of Grand Gulf was incorporated with the usual power of contracting, suing and being sued, and levying taxes. A judgment was recovered against the corporation, on which execution was returned "*nulla bona*." The corporation refused to levy a tax to pay the judgment, whereupon the creditor issued another execution, and levied the same upon the private property of the inhabitants. The court restrained the proceeding, holding that in the absence of express provision, private property could not be taken for corporate debts; and refusing to follow the doctrine laid down in *Angell & Ames on Corp.* sec. 629, and in *Beardsley v. Smith*, 16 Conn. 368. *Ante*, chap. XV. sec. 446. *Infra*, sec. 693, note. *Post*, sec. 762.

proper remedy, to compel the levy and collection of the necessary tax to pay the judgment. When the claim is reduced to judgment, the duty to provide for its payment becomes perfect, and if it can be paid in no other way, it must be done by the levy and collection of a tax for that purpose, and this duty will be enforced by *mandamus*.¹ Indeed *mandamus*, and not a bill in equity, is the proper mode of compelling the performance, by a municipality, of the duty of levying a tax to pay judgments against it.²

§ 687. Where the law under which the debt was incurred provides for the levy of a *special tax* to pay it, this duty will be enforced by *mandamus*, and in such a case it is

¹ *Supervisors v. United States*, 4 Wall. 435, 1866; *Coy v. Lyons*, 17 Iowa, 1; *Olney v. Harvey*, 50 Ill. 453, 1869; *Frank v. San Francisco*, 21 Cal. 668; *Schaffer v. Cadwallader*, 36 Pa. St. 126; *Galena v. Amy*, 5 Wall. 705, 1866; *Von Hoffman v. Quincy*, 4 Wall. 535; *Riggs v. Johnson County*, 6 Wall. 166, 1867; *Weber v. Lee County*, *Id.* 210; *United States v. Keokuk*, *Id.* 514; *Britton v. Platte City*, 2 Dillon C. C. 1, 1871; *State v. Hug*, 44 Mo. 116, 1869; *State v. Milwaukee*, 20 Wis. 87, 1865; *State v. Beloit*, 20 Wis. 79, 1865; *Soutter v. Madison*, 15 Wis. 30; *State v. Wilson*, 17 Wis. 687; *Watertown v. Cady*, 20 Wis. 501. Held to lie, in a *state court*, to enforce a judgment in the federal court of the district; but *quære*, *State v. Beloit*, 20 Wis. 79. See *Ex parte Holman*, 28 Iowa, 88.

Where a city corporation was commanded to levy and collect a *specific tax* sufficient to pay the relator's judgment, a return showing that they had levied a tax to pay this judgment, and *other claims*, is not sufficient. Other claims cannot, in such case, be included. The return should state *facts* showing performing of the mandate, or a sufficient excuse for the non-performance of the duty enjoined. *Benbow v. Iowa City*, 7 Wall. 313, 1868. Mr. Justice Davis, in this case, observes: "To make the return properly responsive to the writ, it was necessary to disclose the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator." This remark is made in relation to that part of the return which states, in general terms, that the defendant had levied a tax sufficient to pay the judgment.

As to the right of the creditor to have the *tax*, which is ordered to be levied, *set apart* and applied to his use, see, also, *Coy v. Lyons*, 17 Iowa, 1; *Galena v. Amy*, 5 Wall. 705; *Loute v. Allegheny County*, 10 Pittsburg Legal Journal, 241; *Pollock v. Laurence County*, 7 *Id.* 373. Judgment creditor entitled, as a reward of his diligence, to priority over simple contract creditors. *Coy v. Lyons*, *supra*. *Mandamus* may be refused if the corporation has been guilty of no unreasonable or improper delay in levying the tax. *State v. Putnam County*, 19 Ohio, 415.

² *Walkley v. Muscatine*, 6 Wall. 481, 1867. *Supra*, sec. 664. *Post*, sec. 598

no answer to an application for this remedy that an execution has not been returned *nulla bona*, or that the corporation debtor may have property subject to a sale on execution.¹

§ 688. Where a municipal corporation is authorized by the legislature to create a debt of a specific character, and to borrow money to pay it, and to make provision for the payment of the principal and interest of the money so borrowed, by the assessment and collection of such taxes as may be necessary, a *mandamus* is the appropriate remedy of the creditor to compel the corporation to levy and collect the taxes to pay such debt or the interest thereon.² And it has been several times adjudged, that where there is a duty to levy and collect a *special tax* to pay a special class of debts—as, for example, railway aid bonds—and there is no valid defence alleged or claimed, and no question made as to the genuineness of the bonds or coupons, and they are in the possession of the relator, that a prior judgment at law was not essential to give the right to a *mandamus* to

¹ *Knox County v. Aspinwall*, 24 How. (U. S.) 376, 1860. In this case an act of Assembly authorized the county to issue its bonds and coupons (see 21 How. 542), and made it the duty of the county commissioners, for the purpose of paying the interest due on the bonds, "at the levying of the county taxes for each year, to assess a special tax, sufficient to realize the amount of the interest to be paid for the year." *S. P. State v. Davenport*, 12 Iowa, 335.

The rights of the creditor under a *mandamus* execution against a county, and its effect upon the county and its funds, under the statute of Pennsylvania, are very fully considered in *Loute v. Allegheny County*, 10 *Pittsburg Legal Journal*, 241, and *Pollock v. Laurence County*, 7 *Id.* 373. It is held by these cases that the effect of such an execution is to set apart for the creditor all unappropriated money in the treasury, and also the first that may come into it, so far as necessary, to pay the execution. See, also, *Commonwealth v. Pittsburg*, 34 Pa. St. 496, 523, as to nature of *mandamus* execution; *Monaghan v. Philadelphia*, 28 Pa. St. 207, 1857. *Supra*, sec. 685, note; *State v. Burbank*, 22 La. An. 298.

² *Von Hoffman v. Quincy*, 4 Wall. 535, 1866; *Walkley v. Muscatine*, 6 Wall. 481; *Commonwealth v. Pittsburg*, 34 Pa. St. 496, 1859; *State v. Commissioners*, 6 Ohio St. 280, 1856; *Flagg v. Palmyra*, 83 Mo. 440; *Commonwealth v. Allegheny County*, 37 Pa. St. 277, 1860; *Maddox v. Graham*, 2 Met. (Ky.) 56, 1859; *Supervisors v. United States*, 4 Wall. 435, 1866; *Riggs v. Johnson County*, 6 Wall. 166; *Knox County v. Aspinwall*, 24 How. 384; *Mayor v. Lord*, 9 Wall. 409; *Supervisors v. Durant*, *Id.* 415.

compel the proper officers to levy and collect the tax.¹ Undoubtedly, in such cases, the court *may* award the writ without a prior judgment, but if there is any doubt as to the validity of the debt, the court may well decline to grant the writ until applied for to enforce a judgment obtained. And in the Federal Court, as we shall presently see, there must be a prior judgment.

§ 689. Although there may be a *discretion* in the city council *as to the amount of tax* which they are authorized to levy for ordinary purposes, yet a creditor who has obtained judgment is entitled to have the whole of the power of the corporation exerted, if it be necessary, for the payment of his judgment.² So where an act of the legislature provided that the city council "*may, if it believe that the public good and best interests of the city require*" it, levy a tax to pay its funded debt, a judgment creditor on a debt of this character may, by *mandamus*, compel it to levy a tax if it refuses to do so.³ So, also, where an act of the legislature declared that the "board of supervisors of counties owing debts which their current revenue, under

¹ Commonwealth v. Pittsburg, 34 Pa. St. 496, 1859; Maddox v. Graham, 5 Met. (Ky.) 56, 1859; State v. Commissioners, &c., 6 Ohio St. 280, 287, 1856; Commonwealth v. Allegheny County, 37 Pa. St. 277, 1860; Columbia County v. King, 13 Florida, 451, 1870. See State v. Davenport, 12 Iowa, 335, where the point was left open.

What the relator, who is the *holder of bonds* issued by a municipal corporation under express authority of the legislature, *must show in order to entitle him to a mandamus* against the corporation to compel it to levy and collect a tax to pay to such bonds, see Commonwealth v. Pittsburg, 34 Pa. St. 496, 1859, where it is fully considered; Commonwealth v. Allegheny County, 32 *Id.* 218; Commonwealth v. Allegheny County, 37 *Id.* 277, 1860; State v. Milwaukee, 20 Wis. 87.

In the State v. Commissioners, 6 Ohio St. 280, 287, 1856, it is held that an agreement of the railroad company to pay the interest on the bonds of the county is collateral, and does not relieve the county from primary liability to the holder. Commonwealth v. Pittsburg, 34 Pa. St. 496, 1859.

² Coy v. Lyons, 17 Iowa, 1, 1864; Butz v. Muscatine, 8 Wall. 575, 1869, denying Clark v. Davenport, 14 Iowa, 494; Commonwealth v. Pittsburg, 34 Pa. St. 496, 513, 517, 1859. *As to limitation on rate or amount of taxation*, see Butz v. Muscatine, *supra*; ante, sec. 107; chap. XIX. on Taxation; Britton v. Platte City, 2 Dillon C. C. 1, 1871.

³ Galena v. Amy, 5 Wall. 705, 1866.

existing law, is not sufficient to pay, *may, if deemed advisable*, levy a special tax, to be used in liquidation of such indebtedness," the Supreme Court of the United States held that this power was mandatory if its exercise was necessary in order to pay judgments rendered against the county.¹ The court places the decision upon the principle that where power is given to public officers, though conferred in language which is permissive in form, it will be regarded as peremptorily imposing a positive and absolute duty, whenever public interests and individual rights call of right for its exercise, and distinguishes the case from those which involve the exercise of a discretion, judicial in its nature, and which the courts cannot control.²

§ 690. If the municipal officers fail or neglect to perform the duty of levying a tax at the *annual or regular meeting*, they may be compelled by *mandamus* to meet again and do their duty, the same as if it had been performed at the proper time and place, and this without the aid of any special legislative enactment.³

§ 691. On the ground that where the law absolutely requires a ministerial act to be done by a public officer, and he neglects or refuses to do it without sufficient legal excuse, he is *liable in a private action* to the person injured by his misconduct, the Supreme Court of the United States held where a judgment creditor of a public corporation had procured a peremptory *mandamus* to county supervisors to levy a tax sufficient to pay his judgment, which they refused or neglected to obey, that they were liable to him in a civil action in damages to the extent of the injury thereby occasioned. The court observed that a mistake as to their duty or honest intentions would constitute no defence to such an action, but it gave no opinion as to the rule by which to measure the damages—that is, whether the plaintiff would be limited in his recovery to the actual injury

Supervisors v. United States, 4 Wall. 435, 1866.

¹ As to mandatory and discretionary powers, see, further. *Ante*, sec. 62; *supra*, sec. 669; People v. Supervisors, 12 Johns. 416.

² People v. Supervisors, 8 N. Y. (4 Seld.) 817, 330, 1853, and prior cases in that state, cited by Willard, J.

sustained, or whether his recovery would be the amount of his judgment, with interest.¹

§ 692. The power to issue the writ of *mandamus* as an original and independent proceeding has not been conferred by the Judiciary Act of 1789 upon the *Circuit Courts of the United States*, and these courts are by that act authorized to issue this writ only when ancillary to a jurisdiction already acquired.* Applying this rule, the Supreme Court of the United States has decided that the holder of coupons attached to bonds issued by a public corporation, and which have not been put into judgment, is not entitled to a *mandamus* from the federal Circuit Court to compel the levy and collection of a tax to pay such coupons.²

§ 693. But where the Circuit Court of the United States has rendered a judgment against a public or municipal corporation, it has the authority, under the fourteenth section of the Judiciary Act, to issue the writ of *mandamus* where it is the appropriate remedy to enforce such judgment. By means of this writ, the Circuit Court of the United States may compel the officers of public and municipal corporations, though deriving their existence from state legislation, to perform their duty to levy and collect the necessary taxes to pay judgments rendered therein against such corporations. The writ of *mandamus*, when so issued, is the final process of the court for the enforcement of its judgment.

¹ *Amy v. Supervisors*, 11 Wall. 136, 1870. The refusal of the treasurer of a public corporation to pay a certified demand against the corporation will not, unless, perhaps, where it can be shown that the refusal was willful, and that he had funds in his hands applicable to the purpose for which they were demanded, make the treasurer *personally responsible* in an action at law, and the appropriate remedy of the party injured is, by *mandamus*, to compel him to make payment. *Huff v. Knapp*, 1 Seld. (N. Y.) 65, 1851, affirming S. C., 3 Sandf. Superior C. R. 299. See *Bartlett v. Crozier*, 17 Johns. 458; *The People v. Lawrence*, 6 Hill (N. Y.) 644. *Supra*, sec. 666, note. Further, as to *personal liability* of public officers. *Ante*, sec. 176, and note; *post*, sec. 730, note.

² *McIntyre v. Wood*, 7 Cranch, 504; *McClung v. Silliman*, 6 Wheat. 601; *Kendall v. United States*, 12 Pet. 584; *The Secretary v. McGarrahan*, 9 Wall. 811; *County of Bath v. Amy*, 14 Wall. 344, 1871.

³ *County of Bath v. Amy*, *supra*. *Ante*, chap. XIV. on Contracts.

and performs, in substance and effect, the office of a writ of execution ; and it is considered by the Supreme Court of the United States to be a writ necessary to render effectual the jurisdiction of the Circuit Court, which attached when the action was commenced, and which existed when the judgment was rendered, and which continues until it is collected. It is a result of these principles, and of the nature of the relations of the national and state jurisdictions, that neither the state legislatures nor the state courts can enjoin, or in any manner interfere with, the federal tribunals in the exercise of the power of enforcing their own judgments.¹ To enforce the payment of judgments rendered therein, the federal courts, on the refusal of the state officers to levy taxes as commanded, have, in a few instances, exercised, though with expressions of reluctance, the high and delicate authority of appointing the United States Marshal as a commissioner for that purpose. The decisions on this subject are referred to in the note.²

¹ *Riggs v. Johnson County*, 6 Wall. 166, 1867, which is the leading case on this subject. Approved and followed : *Weber v. Lee County*, *Id.* 210; *United States v. Keokuk*, *Id.* 514, 518; *Supervisors v. Durant*, 9 Wall. 415; *The Mayor v. Lord*, *Id.* 409; *Amy v. Supervisors*, 11 Wall. 136, 1870; *Knox County v. Aspinwall*, 24 How. 376, 384, 1860. *Ante*, chap. XIV. secs. 415-422.

Illustrative of the controversy between the federal and state authority in Iowa, growing out of municipal railway aid bonds, see, *Riggs v. Johnson County*, 6 Wall. 166; *Weber v. Lee County*, *Id.* 210; *United States v. Keokuk*, *Id.* 514, 518; *Lee County v. Rogers*, 7 Wall. 181, 1868. *Ante*, chap. XIV. secs. 415-426; *Holman, Ex parte*, 28 Iowa, 88, 1869. In *King v. Wilson*, 1 Dillon C. C. 555, 1871, the history of the state adjudications is given on the subject of municipal aid to railways. *Ante*, sec. 104.

² *Supervisors v. Rogers*, 7 Wall. 175, 1868. The appointment of the marshal, in this case, as such commissioner, was considered to be authorized by the statute of the State (Revision of Iowa of 1860, sec. 3770), adopted in this particular case, and not by a general rule of practice. See, also, *Lansing v. County Treasurer*, 1 Dillon C. C. 522, 1870; *Welch v. Ste. Genevieve*, *Id.* 130, 1871.

In *Morgan v. Beloit*, in the United States Circuit Court for Wisconsin, the question of the right of a judgment creditor of a municipality which would not levy and collect the necessary taxes to pay his judgment, *to resort to equity* for relief, was presented. The debt of the town, in that case, was incurred under a special act of the legislature, approved February 10, 1853, authorizing the town of Beloit to issue bonds in aid of a railroad, and the

Application for the Writ—Relator—Rule Nisi.

§ 694. It is not our purpose to treat at large of the proceedings and practice in respect to the remedy by *man-*

8d section of the act provided that "the board of supervisors of the town of Beloit, whenever the same shall become necessary, shall annually levy a tax upon the taxable property of said town, sufficient to pay the interest upon such bonds, after deducting the dividends due to such town on said shares of stock." The complaint recovered a judgment in the federal court in 1860, and a peremptory *mandamus* was issued in 1862, commanding the board to levy a tax to pay the judgment, but, by repeated resignations, causing vacancies and want of quorum, no tax had ever been levied, and no attachments for contempt (as the bill alleged) could be had or made effectual. The bill made the town, in its corporate capacity, and its inhabitants, *defendants*, and asked for a decree subjecting the taxable property of the town and of the inhabitants to sale at auction by the marshal. A demurrer to the bill was sustained and the bill dismissed by Miller, District Judge, holding the Circuit Court. On appeal, the Supreme Court, after one argued a re-argument upon this question: "Whether or not it is competent for the Circuit Court of the United States, on a bill filed for the purpose, to appoint a master or commissioner to levy and collect a tax, under and in pursuance of the 3d section of an act passed by the legislature of Wisconsin, February 10th, 1853, upon the taxable property of the town, sufficient to pay the judgment of the plaintiff, in case of a refusal of the supervisors of the town to levy the same, after service of a peremptory writ of *mandamus*." At the December term, 1869, the decree below, dismissing the bill, was affirmed by an equal division of opinion, there being at the time eight judges on the bench. No opinions were delivered, and no report of the case has been published. The arguments of counsel (Mr. Carpenter for the bill, and Messrs. Palmer and Ryan, *contra*) were mainly addressed to the question of *equity jurisdiction* in such a case, and the right to subject the *private property* of the inhabitants to the payment of the debts of the municipality. *Ante*, sec. 685, note. *Supra*, sec. 446.

In *Rees v. Watertown*, in the Circuit Court of the United States for the western district of Wisconsin, June term, 1872, the bill, which was similar to the one in the case of *Morgan v. Beloit*, *supra*, was dismissed, Hopkins, District Judge, expressing an opinion against the right claimed, and *Drummond*, Circuit Judge, in view of the diversity of opinion among the judges in *Morgan's* case, concurring in that disposition of the matter.

In *Hubbell v. Waterloo* (town of), the Circuit Court of the United States for the eastern district of Wisconsin (present, *Drummond* and *Müller*, J.J.), in April, 1872, in an application in a *mandamus* proceeding supplemental to a judgment against the town of Waterloo for the appointment of the marshal as commissioner to levy and collect the taxes, which the local officers evaded, and refused (by successive resignations) to levy and collect, the

damus. We shall refer to these in a general way only, in order the better to illustrate the application of the writ to municipal corporations and municipal officers. The practice in the different States is as at common law, modified by statutory enactment. The writ is not granted of course, but upon motion, based upon affidavits, or upon a suggestion supported by oath, which must be drawn up with precision, and state with clearness and certainty the grounds for the application, and must also show a case in which the writ lies. If there be another remedy apparently adequate and complete, the affidavits must show why it is not sufficient or why it would prove ineffectual.¹

judges were divided in opinion as to the power of the court to make the appointment, and the question was certified to the Supreme Court of the United States, where it is understood to be now pending.

¹ *Rex v. Oxford*, 7 East, 845; Buller's *Nisi Prius*, 201; Stephens' *Nisi Prius*, 2318; Willc. 357, pl. 43, 44; *Rex v. Margate Pier Company*, 3 B. & Ald. 221, 224; *People v. Supervisors*, 27 Cal. 655; *People v. Chicago*, 51 Ill. 17. An alternative writ stands in the place of the declaration in an ordinary action, and must show a good *prima facie* case, or it is demurrable. *Id.*; *People v. Ransom*, 2 Comst. 490; *Hoxie v. Commissioners*, 25 Maine, 233; *Canal Trustees v. People*, 12 Ill. 254; *State v. Bailey*, 7 Iowa, 390; *State v. Haben*, 22 Wis. 660; *People v. Hilliard*, 29 Ill. 413; *People v. Baker*, 35 Barb. 105; *State v. Board, &c.*, 10 Iowa, 157.

"In practice," says *Thompson, J.*, "the party seeking the remedy by *mandamus* presents to the court a *prima facie* case, entitling him to the writ by way of suggestion [or by affidavit or sworn information]. This being in proper form and sufficient in substance, an alternative *mandamus* may be awarded upon it, reciting the complaint of the relator and his demand for redress, and commanding the party to whom it is directed either to obey it or return his reasons for not doing so. This alternative is what gives the denomination of 'alternative *mandamus*' to the first writ. The establishment of a duty, and the obligation to perform it, is upon the plaintiff to show, and this is considered as done, *prima facie*, when the court awards the writ. The respondent, upon service of it, is bound either to obey, or show that the plaintiff has no right to demand obedience, or that no duty exists which he can be compelled to perform. Whenever this is not accomplished by a demurrer, or by a general traverse of the facts set forth in the writ, it is generally done by matters averred in the return by way of confession and avoidance." *Commonwealth v. Allegheny County*, 37 Pa. St. 277, 279, 1860.

If there be no special *statute limitation*, the application for the writ may be made within the period given by statute for bringing ordinary actions for similar injuries. *People v. Supervisors*, 12 Barb. 446; *Prescott v. Gon-*

§ 695. Where the application for the writ relates to a matter affecting the public, such as the enforcement of an act of the legislature for the public benefit, the state or its attorney, in a proper case, is entitled to the writ as of right.¹ It has been held sufficient to entitle a person to become an applicant or relator in such cases that *he* is interested as a citizen ;² but the cases on this point are not entirely uniform. Accordingly, a voter in a municipality may apply for a *mandamus* to compel the council to hold an election to fill a vacancy in their body,³ or to test the validity of an election.⁴ In this country the writ is resorted to for the enforcement, in proper cases, of individual rights, or rights of a private nature, in the absence of any other adequate legal remedy, and to prevent a failure or defect of justice ; and,

ser, 33 Iowa, 175, 1872. The author doubts whether the three years statute applied to the case. But the writ, not being one of right, there is a discretion to refuse it if the applicant has been guilty of unreasonable laches and delay in asserting his right. The Queen v. Halifax Road Trustees, 12 Q. B. 442; Savannah v. State, 4 Geo. 26; Rex v. Lancashire, 12 East, 366; Rex v. Canal Company, 1 M. & S. 32; Regina v. Canal Company, 11 A. & E. 316; True v. Melvin, 43 N. H. 503.

If *no just and useful purpose* requires the writ of *mandamus* to be granted, the court has discretion to refuse it. State v. Graves, 19 Md. 351, 374; Williams v. Commissioners, 35 Maine, 345; People v. Supervisors, 15 Barb. 607; People v. Pratt, 30 Cal. 223. So in a case where the substantial right claimed by the relator is *doubtful*. Insurance Company v. Wilson's Heirs, 8 Pet. 291; People v. Chicago, 51 Ill. 17; Stephens' *Nisi Prius*, 2293. *Ante*, sec. 667. Or is *insignificant*, as where only two dollars are involved. People v. Hatch, 33 Ill. 9.

¹ Tapping on *Mandamus*, 54, 56, 288. Thus, where the application is to proceed to the election of burgess in the place of one deceased, the motion is *ex debito justitiæ*, and there is no discretion to refuse the writ. *Id.* State v. Railroad Company, 29 Conn. 538; People v. Attorney-General, 22 Barb. 114; People v. Tracy, 1 Denio, 617.

² Pike County v. State, 11 Ill. 202; Ottawa v. People, 48 Ill. 233; Regina v. Archbishop, 11 Q. B. 578; People v. Halsey, 53 Barb. 547; People v. Brooklyn, 22 Barb. 404; Hamilton v. State, 3 Ind. 452; People v. Collins, 19 Wend. 56; Moses on *Mandamus*, 197—author's opinion; *Ex parte* Fuller, 25 Ark. 261; People v. San Francisco, 36 Cal. 594; Bryan v. Cattell, 15 Iowa, 538; compare Sanger v. Commissioners, 25 Maine, 291; People v. University Regents, 4 Mich. 98, 1856; People v. Prison Inspectors, *Id.* 187; Bates v. Plymouth, 14 Gray, 163.

³ State v. Rahway, 33 N. J. Law, 110, 1865.

⁴ State v. County Judge, 7 Iowa, 186; State v. Bailey, *Id.* 390.

in such cases, the party really or beneficially interested in the performance of the legal duty which the defendant neglects or refuses to perform may apply for the writ.¹

¹ *Commonwealth v. Allegheny County*, 37 Pa. St. 277, 279, 1860; *Bryan v. Cuttall*, 15 Iowa, 538, *per Wright*, J.; *Ottawa v. People*, 48 Ill. 233, 1868; *Maddox v. Graham* (right of municipal creditors), 2 Met. (Ky.) 56, 1859; *The People v. Pacheco*, 29 Cal. 210; *Marbury v. Madison*, 1 Cranch, 137; *Kendall v. Stokes*, 3 How. (U. S.) 87. As to the rights of tax-payers: *Post*, chap. XXII. See *Rex v. Frost*, 8 A. & E. 822, for a case in which an individual having a remote interest in corporation funds was held not entitled to the writ.

Who may be a relator. The inhabitants of a county who are put to inconvenience in reaching the court house have such an interest in the erection of a new one in the new county site as will authorize them, as relators, to sue out a *mandamus* to the proper authorities or officers to proceed to the construction of the new court house, as provided by law, and to levy taxes pursuant to the requirements of the statute. *Watts v. Carroll Parish*, 11 La. An. 141, 1856. *Supra*, sec. 672.

Under a provision in the *Ohio* code (sec. 570) that the writ "may issue on the information of the party beneficially interested," the writ may properly issue, and the proceedings be conducted in the name of the state on the relation of the party interested. *State ex rel. &c. v. Commissioners of Perry County*, 5 Ohio St. 497, 1856; *State v. Zanesville, &c. Company*, 16 Ohio St. 308, construing the phrase, "beneficially interested."

In *Iowa*, by statute, the writ and proceeding are in the name of the state if a public interest be involved, and of the relator if only a private interest is concerned. Revision of 1860, sec. 3761; *State v. County Judge*, 2 Iowa, 280; *State v. Bailey*, 7 Iowa, 390. And in a matter of public right, any citizen may be the relator in an application for a *mandamus*. *State v. County Judge*, 7 Iowa, 186.

An act of the legislature specially commanded the town council to open a certain alley, and it was held that the incidental advantages which a certain person would derive from the opening of the alley by reason of the location of his property, did not entitle him to a *mandamus* to compel the performance of the duty enjoined by the act, the relator's right being regarded as one held in common with other inhabitants of the place. *Heffner v. Commonwealth*, 28 Pa. St. 108, 1857. But see chap. XVIII. on Streets, *ante*. So where an obstruction to a sidewalk is no more injurious to the relators than to others, and where there is a remedy by indictment, it was held that *mandamus* was not the proper remedy to compel the city council to open streets and to remove encroachments thereon. *Reading v. Commonwealth*, 11 Pa. St. 196, 1849. *Ante*, secs. 521, 522, 673.

Canal appraisers, appointed by the state to appraise damages, and who, in a case within the statute, refuse to act, will be compelled to proceed by *mandamus*, and estimate the relator's damage, and pay the same. *Ex parte Jennings*, 6 Cow. 518, case growing out of the construction of Erie canal; *People v. Seymour*, 6 Cow. 579; *Ex parte Rogers*, 7 Cow. 526, 1827.

696. When the writ is sought to enforce individual rights, the affidavits must show in the applicant or relator a *prima facie* case, and that he has complied with every requisite, to perfect his right to this remedy. Thus, as it is, in general, necessary that the *defendant should have been requested* to do that of which performance is sought by means of the writ (the object being that he shall have the option to do or to refuse that which is demanded), the affidavits must show the demand and the neglect or refusal, or circumstances, such as unreasonable delay, or neglect to discharge a public duty, which clearly evince an intention not to do the act required.¹

§ 697. If the affidavits, information, or petition under oath, show the case to be one in which the writ lies, and make out a *prima facie* case for the applicant, a rule is granted upon the defendants, that is, to the persons to whom the writ is to be directed, *to appear and show cause* why the

¹ *State v. Rahway*, 33 N. J. Law, 110, 1868; *Tapping on Mandamus*, 283; Willc. 357, pl. 44; *State v. Lehre*, 7 Rich. (South Car.) 322; *Commonwealth v. Allegheny County*, 37 Pa. St. 237, 1860; *Angell & Ames*, sec. 707, and cases cited; *Commonwealth v. Allegheny County*, 37 Pa. St. 277, 291, 1860, *per Thompson*, J.; *People v. State Treasurer*, 4 Mich. 27; *Stephens' Nisi Prius*, 2292, 2318, 2319; *Maddox v. Graham*, 2 Met. (Ky.) 56, 70, 1859. *Alexander v. McDowell*, 67 North Car. 330, 1872.

Further, as to *demand and refusal, and when necessary*. *Tapping*, 285, 286; *Rex v. Canal Company*, 3 Ad. & E. 217; *Ib.* 477; *Regina v. Bristol Company*, 4 Q. B. 162; 3 G. & D. 384. But an objection for want of demand may come too late after the merits of the case have been heard. *Tapping*, 287; approved, *State v. Lehre*, 7 Rich. 322. The board of supervisors of a county were directed by statute to meet at a specified place and time, and then and there subscribe a specified sum to the stock of a railroad company, and it was held that the company must tender its books to the officers of the county and demand the subscription, before it could apply for a *mandamus* to compel the county to subscribe. *Railroad Company v. Plumas County*, 37 Cal. 354, 1869. The Supreme Court of Kansas has held that the vote of the people of a county to subscribe for the stock of a railroad company and to issue its bonds, does not create a contract between the county and the company, even though such vote was upon conditions, which the company subsequently performed; and the court refused on *mandamus* to compel the subscription. *Union Pacific R. R. Co. v. Davis County*, 6 Kansas, 256, 1870. See *State v. Saline County*, 45 Mo. 242; *ante*, sec. 42. No demand to levy a tax was considered necessary where the duty was imperative. *Columbia County v. King*, 13 Fla. 451.

writ shall not issue. In the practice in this country the rule *nisi*, or notice, is often dispensed with, and an alternative writ granted *ex parte* in the first instance.¹ If, upon the rule *nisi*, or notice, the defendant does what is sought, the rule will be discharged. The defendant may show for cause, by affidavits, that the case is not one in which the writ lies, that there is a specific and adequate legal remedy, or that the relator or applicant has no title or right to the writ, or that by his neglect or misconduct he is not entitled to the benefit of the remedy, or the assistance of the court. If after the defendant has shown cause there remains a reasonable ground of right in the applicant, the rule for a *mandamus* will be made absolute, and an alternative writ will issue, which must substantially follow, and not materially vary from, the affidavits, petition, or rule upon which it is founded.²

Form, Direction, and Service of the Writ.

§ 698. The writ of *mandamus* has the usual formalities of other writs, but *no precise formula* is necessary in the language to be employed in framing it. It must show with certainty the duty to be performed, and command those to whom it is directed to perform some specific and definite act or acts. It must follow the rule, or affidavits, or information upon which it is founded, must be properly directed, must bear test in term time, and, under the practice at common law, it must be tested on the very day on which the rule for the writ is made absolute.³

¹ *State v. Fairchild*, 22 Wis. 110, 1867; *State v. Lean*, 9 Wis. 279; *Chance v. Temple*, 1 Iowa, 179.

² 3 Blacks. Com. 110, 111; Willc. 387.

³ *Commonwealth v. Pittsburg*, 34 Pa. St. 496, 1859; *Rex v. Dublin*, 1 Stra. 540; *Selwin's Nisi Prius*, 1061; *Sterling's Case*, 1 Sid. 340; *Rex v. Willis*, 7 Mod. 262; *Rex v. Kingdon*, 8 Mod. 210; S. C., 11 Mod. 382; S. C., 1 Stra. 578; *Rex v. Wildman*, 2 Stra. 880; Willc. 387; *Rex v. Conyers (teste)*, 8 Queen's B. 981; *Stephens' Nisi Prius*, 2321; *Chance v. Temple*, 1 Iowa, 179, where the practice is fully stated by *Lebell, J.*; *Price v. Harned*, 1 Iowa, 473.

The duty required must be *specifically stated, and not in the alternative*, as that a municipal corporation pay a judgment, or issue its bonds in pay-

§ 699. The *direction of the writ* is one of the most material portions of it; and it must be directed to the persons or officers, or to the corporate body legally bound to execute it, and it should be directed to such only. The common law consequence of a failure to observe this rule is, that the writ may be either superseded or quashed. If a *joint act* is to be performed by two or more, the writ must be directed to all, though only a portion have refused to do the act, and the rest are willing.¹ The writ, when directed to a corporate body, should state the title of the corporation with accuracy, using the name prescribed by charter or statute; if there be none such, and a name has been acquired by reputation, the writ may be directed accordingly:² the effect of misnaming the corporate body is that the writ will be quashed, unless by the law, or the practice of the particular state, it may be amended.³ But in some

ment, or levy a tax to pay it. *State v. Milwaukee*, 23 Wis. 397; *Rex v. Kingston*, *supra*; *Tapping*, 327. But see *Regina v. St. Margaret's*, 1 P. & D. 116; 8 Ad. & E. 889, where it was held no ground of objection to a command in the alternative to do one of three things, if the duty enjoined by act of parliament forms one of them, and there has been a general refusal. *Regina v. Railway Company*, 4 H. L. Cas. 471. The command must be *to perform the act*, and not *to command others to perform it*. *Rex v. Derby*, 2 Salk. 436.

When there is no rule of law or rule of court controlling it, the writ may be *made returnable* at the same term it is issued, or at the next term, in the discretion of the court. *Harwood v. Marshall*, 10 Md. 451; *Fitzhugh v. Custer*, 4 Texas, 391; *State v. Jones*, 1 Ire. (North Car.) 129.

¹ *Tapping* on *Mandamus*, 310, where an alphabetical series of the usual *directions* of the writ in England is given. *People v. Yates*, 40 Ill. 126; *State v. Jones*, 1 Ire. (North Car.) 129; *Rex v. Hereford*, 2 Salk. 701; *Buller, Nisi Prius*, 204.

² *Ante*, secs. 119, 120; *Rex v. Smith*, 2 M. & S. 598; *Estwick v. London*, Sty. 43, 32; *Carpenter's Case*, Raym. 439; *Tapping*, 314; *Tavener's Case*, Raym. 446.

³ *Mayor v. Lord*, 9 Wall. 409, 1869; *Tapping* on *Mandamus*, 314.

Amendments. In England the statute of 9 Anne, chap. XX. sec. 7, extended the statutes of *joefails* "to all writs of *mandamus* and informations in the nature of *quo warranto*, and all the proceedings thereon for any of the matters in this act mentioned." As to the extent of the right in England to amend the writ, and the return: Willc. 433-437; *Regina v. Conyers*, 8 Q. B. 981; *Commonwealth v. Pittsburg*, 34 Pa. St. 496, 515. In this last case *Strong, J.*, remarks: "Formerly, when the doctrine of amendments re

cases, there is an option to direct the writ either to that *part* of the corporation which alone has the power to execute it, and on which alone the particular duty rests, or to the *whole corporation* by its corporate name or title.¹

§ 700. We have heretofore pointed out the difference between an old English municipal corporation, consisting of

mained as at common law, the court would not allow the writ of *mandamus* to be amended after return filed; but, as is said by *Tapping*, p. 334, the strict rule of the common law has been, of late years, altogether departed from, the principle as to amendment which now obtains being, that it shall be allowed in all cases when such a course will promote justice. Thus, in a late case, the court ordered the writ to be amended during an argument, in order that such argument might proceed independently of such objection. *Rex v. Newbury*, 1 Queen's B. 759."

Further as to amendments: Willc. 433; Stephens' *Nisi Prius*, 2324; Jones v. State Auditor, 4 Ohio St. 493; Supervisors v. Durant, 9 Wall. 786, 1869; State v. Milwaukee, 23 Wis. 397; Commissioners v. People, 38 Ill. 347; State v. Elwood, 11 Wis. 17; State v. Hastings, 10 Ib. 518; Springfield v. Hampden, 10 Pick. 59. *Writ and information amendable*. State v. Bailey, 7 Iowa, 390; Chance v. Temple, 1 Iowa, 179; State v. Keokuk, 18 Iowa, 383; State v. County Judge, 12 Iowa, 237; Regina v. Conyers, 8 Q. B. 981.

If it appears to the court that the relator is entitled to a *mandamus* the writ will not be quashed because the petition or suggestion or affidavits do not state that the relator is without other adequate remedy. *People v. Hilliard*, 29 Ill. 413.

¹ *Tapping* on *Mandamus*, 315, 317. The author here refers to the English cases under the old corporations on this subject, and observes that "The result of the above cases, therefore, is, that if the writ be directed neither to the corporation by its corporate name, nor to those who should execute it by their proper descriptions [but 'in terms extends the descriptions beyond the part legally liable to execute the writ'], it is clearly bad, and is liable either to be superseded or quashed." *Ib.* 317; *Rex v. Smith*, 2 M. & S. 598; *Rex v. Abington*, 2 Salk. 700; *Rex v. Norwich*, 1 Stra. 55; *Pees v. Leeds*, *Ib.* 640. "The writ," says Mr. Willcock (Corp. 389, pl. 135, 137), "may be directed in the corporate name, although the act commanded is to be done by a select body, without the interference of the rest; for their act in such capacity is the act of the corporation; 'yet, where the act is to be done by a select body alone, the writ may be directed to them alone in their name as a select body.'"

"If the writ is directed to the corporation, it has been held good. But if it be directed to those who, by the constitution of the corporation, ought to do the act, without doubt it is good also." *Per Holt*, C. J., *Rex v. Abington*, 1 Ld. Raym. 560. See, also, *Rex v. Oxford*, 6 Ad. & E. 849; *Rex v. Abingdon*, 2 Salk. 700; *Rex v. Hereford*, 1 Ld. Raym. 559; *Regina v. Ledgard*, 1 Ad. & E. (N. S.) 616; *Regina v. Stamford*, *Ib.* 483.

integral parts or different classes, and the American municipal corporations,¹ and this distinction is to be regarded in the application of the decisions of the English courts respecting the direction of writs of *mandamus*. In England, if the act commanded must be done by the whole corporation, the writ should be directed to the corporation in its corporate name, and not by an enumeration of the classes which compose the corporation, nor to all the members as individuals. Thus, if the corporation be styled "Mayor and Commonalty," but consist of mayor, alderman, and burgesses, the writ must be directed to the "Mayor and Commonalty," (that being the corporate name), and it must be so directed, although the mayor, who is an integral part of the corporation be dead.* Our municipal corporations do not consist of integral parts and distinct classes, but usually have a specific name, and their legislative powers are exercised by a council. These circumstances influence the direction of a writ, for, as we shall presently see, the writ, in all cases where the duty to be performed rests upon the council, may be directed to the corporation by its corporate name, or to the officers composing the council in their official capacity.

§ 701. In this country, the ancient strictness in respect to the direction of the writ is somewhat modified by judicial decision and statutory enactment. Where there is a duty resting on the corporation to levy taxes for the benefit of its bondholders or creditors, the writ may be directed to the individuals, in their official capacity, composing the council or other body, whose duty it is to make the levy and who have the power to execute the writ; and in such a case,

¹ *Ante*, chap. III.

* *Rex v. Smith*, 2 M. & S. 598; *Rex v. Abingdon*, 1 Ld. Raym. 560; *Rex v. Plymouth*, 1 Barnard. 81; *Rex v. Cambridge*, 4 Burr. 2011. Under the Municipal Corporations Act, 5 and 6 Will. IV. chap. LXXVI., *ante*, sec. 16, "the corporation," says Mr. *Grant*, "acts by the agency of the council, and, therefore, the acts of the council are the acts of the corporation. Hence, a *mandamus* ought to be directed to the corporation by their corporate name, though the thing in it required to be done is, by the statute to be done by the council." *Grant on Corp.* 355, note; citing *Rex v. Oxford*, 6 Ad. & E. 349; *Rex v. Gloucester*, 3 Bulst. 190; *Rex v. Abingdon*, 2 Salk. 699; *Rex v. Hereford*, *Id.* 701; *Regina v. Ledgard*, 1 Q. B. 620, 621 *Mayor, &c. v. Regina*, 10 Q. B. 574, 579.

the writ may also, we think, be properly directed to the corporation by its corporate name, and be served upon the officers thereof, who have the power, and whose duty it is to execute it.¹

¹ *Commonwealth v. Pittsburg*, 84 Pa. St. 496, 1859; *The Mayor (of Davenport) v. Lord*, 9 Wall. 409, 1869; *Maddox v. Graham*, 2 Met. (Ky.) 56, 1859; *Louisville v. Kean*, 18 B. Mon. 9, 13, 1857. In *Commonwealth v. Pittsburg*, above cited, the writ was directed, "To the Select and Common Councils of the City of Pittsburg, composed of D. Fitzsimmons" and others [stating the names of all the individuals composing the said bodies, without discriminating which of the persons named belonged to the select, and which to the common, council], and the writ was held to be well directed, although the corporate name of the city was, "The Mayor, Aldermen, and Citizens of Pittsburg." The misdirection of the writ was set up in the return, and in treating of the objection, *Strong, J.*, delivering the opinion of the court, observes: "The next averment of the return is, that there is no such corporation or body politic known to the law as the City of Pittsburg, of whose councils, select or common, the persons named in the writ are supposed to be members, but that the corporate name is, 'The Mayor, Aldermen, and Citizens of Pittsburg.' The writ is directed to the select and common councils of the city of Pittsburg, composed of D. Fitzsimmons and others, defendants. It is not directed to the city, but to the individuals who constitute the select and common councils. The question is not, therefore, whether, if an action had been brought at law against the city of Pittsburg, the misnomer might have been pleaded in abatement, for it is not the corporation which is sued. But even if it were, the mistake is amendable. Formerly, when the doctrine of amendments remained as at common law, the court would not allow a writ of *mandamus* to be amended after return filed; but, as is said by Tapping, p. 334, the strict rule of the common law has been, of late years, altogether departed from; the principle as to amendment, which now obtains, being that it shall be allowed in all cases when such a course will promote justice. Thus, in a late case, the court ordered the writ to be amended during an argument, in order that such argument might proceed independently of such objection (*Rex v. Newbury*, 1 Q. B. 759). It needs no argument to prove that justice would not be promoted by turning the relator out of court because he has described the defendants as members of the select and common councils of Pittsburg instead of members of the select and common councils of 'the mayor, aldermen, and citizens of Pittsburg.' Even the very act which incorporated the city more than once denominates it the city of Pittsburg. One of our statutes of amendments authorizes an amendment of the record of an action in any stage of the proceedings when it shall appear, by any sufficient evidence, that a mistake has been made in the Christian name or surname of any party, plaintiff or defendant. As statutes of *jeofails* are construed liberally, it would seem to be within the spirit of this act to allow an amendment of a corporate name when a corporation is a party;

§ 702. A distinction is to be observed between a misdirection, by being directed to the wrong persons, and a direction to the right persons by an erroneous name. In the former case, the writ may be superseded on motion, while in the latter case the defect must be relied upon in the return, and the objection is in the nature of a plea in abatement.¹

but whether it would or not, need not now be decided, for the *mandamus* is not to the artificial being, known either as the city of Pittsburg or as 'the mayor, aldermen, and citizens of Pittsburg.' It is not, therefore, misdirected. Next, the return avers that the select and common councils are not integral parts of the corporation, but only several and co-ordinate branches of the legislature thereof, acting separately and independently of each other; that the concurrence of both bodies is essential to the validity of all legislative acts affecting the corporation; and that the defendants are without power, of themselves, to assess or impose taxes, or to compel the concurrence of the other branch of said councils in any act. We do not perceive that this is any answer to the mandate of the writ, and no attempt has been made to show us how the fact averred is material. The defendants are *all* the members of *both branches*, and if each discharges his duty, there can be no want of concurrence of councils." 84 Pa. St. 496, *supra*. See also, *Rex v. Tregony* (mayor of), 8 Mod. 111.

In the *Mayor (of Davenport) v. Lord*, above cited, it appeared that the municipality was incorporated by the name of "The City of Davenport," and by *that* name had power "to sue and be sued in all courts," and that the "city council," which exercised all the legislative powers of the corporation, and had the sole power to levy and collect taxes, was composed of the mayor and aldermen, and a writ of *mandamus* in favor of a judgment creditor of the city, commanding the levy of taxes to pay the judgment, was directed "To the Mayor and Aldermen" of the city. The objection was made that the writ ought to have been directed to the city by its corporate title, but the objection was not sustained. The view of the Supreme Court was, that since the affairs of the city were managed by the mayor and aldermen composing the city council, which had the sole power to levy and collect taxes and provide for the payment of the debts of the corporation, the writ was well enough directed. The exact language of the court is: "The point that the writ was misdirected is not well taken—the direction was *substantially correct*." There can, we think, be little doubt that the writ could have been properly directed to the corporation by its corporate title, and as the duty was a corporate one, though to be performed by the council, the direction of the writ in such a case to the corporation, by its charter name, and service upon the proper officers, would seem to be an equally appropriate mode.

¹ *Rex v. Smith*, 2 M. & S. 598; *Rex v. Ipswich*, 2 Ld. Raym. 1239; S. C., 2 Salk. 435; *Rex v. Norwich*, 1 Stra. 55; Willc. 388, pl. 131.

§ 703. It is advisable that *writs to officers* to perform an official duty should be directed to them in their official names, as "To the Mayor and Aldermen of," &c., omitting the personal names of the officers, as this course precludes questions which might be made arising from a change of officers.¹ The writs must be directed to officers in their proper capacity.

§ 704. The writ, as we have seen, must be directed to those who are to execute it, or do the thing required, and it must be *delivered to, or served upon*, those who are to make the return.² Whether the writ be directed to the corporation or the council,³ *the service* ought, in our opinion, to be

¹ Tapping on *Mandamus*, 315, 317; *Louisville v. McKean*, 18 E. Mon. 9, 13, 1857; *infra*, sec. 712; *State v. Elkinton*, 1 Vroom (N. J.) 335; *Beachy v. Lamkin*, 1 Idaho, 48; *State v. Gates*, 22 Wis. 210; *People v. Bacon*, 18 Mich. 247; *Soutter v. Madison*, 15 Wis. 30; *Rex v. West Looe*, 3 B. & C. 385; Willc. 391, pl. 140.

In *Regina v. Eye* (mayor of), 9 A. & E. 676, where the mayor and assessors, under the English Municipal Corporations Act, had expunged the name of the relator from the burgess role, and the relator, at the next term, obtained a rule for a *mandamus* to the mayor (the proper officer under the act) to insert his name, the court made the rule absolute, *directing the mandamus to the mayor generally*, notwithstanding that the mayor, who had expunged the name, had ceased to be mayor before the rule *nisi* was obtained, that no application had been made to the mayor then in office, and that the year to which the burgess list belonged had expired before making the rule absolute. In one case in England, where it was doubtful whether the last mayor had power to hold over, the court ordered that the writ should be directed to the *late mayor*, without specifying his name. Willc. 389, pl. 133.

² *Rex v. Hereford*, 2 Salk. 701; *Rex v. Derby*, *Id.* 486; *Pees v. Leeds*, 1 Stra. 640.

³ *Supra*, secs. 699-701.

On this subject some decisions have been made in England which seem to be inapplicable, at least in their full extent, to our municipal corporations. Thus, it is held, that where a *mandamus* is directed to the "mayor, &c." the mayor alone can make return, and the other integral parts of the corporation cannot disavow it. The reason assigned is, that the court cannot refuse the mayor's return, he being the principal officer to whom the writ is directed and to whom it is actually delivered, and all the court can do is to compel a return, and if the mayor makes a return contrary to the votes of the majority concerned it is at his peril, and he may be punished by information in the King's Bench. *Rex v. Abingdon*, 2 Salk. 431; *Id.* 699; *Stephens' Nisi Prius*, 2326. Accordingly, it has also been held that

made upon the officers who, under the law, have the power to do the act commanded, and against whom an attachment to enforce obedience should issue.

The Return, and Subsequent Proceedings.

§ 705. The return to the alternative writ must be made by the corporation, body, officers, or persons to whom the writ is directed; must state facts clearly, positively, and without ambiguity or by way of argument; if it traverses the facts stated in the writ it must deny or answer all that are material, or it may aver, in accordance with the rules of pleading, other facts in avoidance, and such facts "must also be clearly and specifically set forth in the return with sufficient certainty, and not argumentatively, inferentially, or evasively, so that the court may see at once that such facts, if established or admitted, are sufficient as the alternative for obedience to the writ."¹ The return need not be

if the writ be directed to a corporation, it ought to be served upon the mayor. *Rex v. Exeter*, 12 Mod. 251. So, on a *mandamus* to elect a clerk, it was decided that the writ should be delivered to the mayor, as the most visible part of the corporation, notwithstanding the power of election was in the common council. *Regina v. Chapman*, 6 Mod. 152. [See *State v. Milwaukee*, 22 Wis. 396, 397.] In another case it was held that personal service on the town clerk of a peremptory writ to the corporation was sufficient to found an application for an attachment. *Rex v. Fowey*, 4 D. & R. 614. It seems that an attachment may be granted against a mayor, on affidavits that the writ has been left at his house, he having kept out of the way to avoid it. *Rex v. Tooley*, 12 Mod. 312; Wille. 450. At common law the return to a writ of *mandamus* to a corporation, being an act to be entered of record, it need not be under the seal of the corporation, nor signed by the head or other officer of the corporation, for at common law no officers are obliged to sign their returns. *Rex v. Exeter*, 1 Ld. Raym. 223; *Rex v. Clarke*, 2 *Id.* 848; *Id.* 849; *Rex v. Wigan*, 3 Burr. 1645; *Grant on Corp.* 63, 228, 229.

In this country the *mode of service* is usually prescribed by statute. *Haveyreyer v. Supervisors*, 22 Wis. 396, construing the statute of Wisconsin to require the board of supervisors to be served by leaving the original writ of *mandamus* with the chairman, and a copy with each of the supervisors. In New Jersey, see *State v. Elkinton*, 1 Vroom, 335. Proper mode of making return by county justices or supervisors. *Lander v. McMillan*, 8 Jones (North Car.) Law, 174; *McCoy v. Harnett*, 4 *Id.* 180; *People v. San Francisco*, 27 Cal. 655.

¹ *Commonwealth v. Allegheny County*, 37 Pa. St. 277, 279, 1860, *per*

single, but may state several distinct grounds in answer to to the writ, and it is enough if any one of them be sufficient, that is, disclose legal reasons why the act commanded by the writ should not be performed.'

§ 706. Under the statute of Anne, or similar statutes adopted or enacted in most of the states, or by the course of practice therein, the return, if false in fact, is not conclusive in the *mandamus* proceeding, and the relator or prosecutor is not driven as at common law to his action on the case for a false return, but may contest the truth of the return.' It may be stated to be generally true in this country, that upon service of the alternative writ the respondent, or party to whom it is directed, may either : 1, obey the command of the writ and show that fact ; or 2, he may object to the writ for defects therein, and move to quash or supersede the same ; or 3, he may demur to the writ ; or 4, traverse in the return the facts set forth in the writ ; or 5, aver in the return other facts by way of confession and avoidance of the facts stated in the writ.' And

Thompson, J., where the principle is well illustrated and applied. *People v. Baker*, 35 Barb. 105; Willc. 401-409; *Loute v. Allegheny County*, 10 *Pittsburg Legal Journal*, 241; *Pollock v. Lawrence*, 7 *Id.* 373; *Commissioners v. Tarver*, 21 Ala. 661; *Commonwealth v. Pittsburg*, 34 Pa. St. 496, 1859; *Soutter v. Madison*, 15 Wis. 80; *Grant on Corp.* 228-240. The mandatory part of the alternative writ, if certain, may be general, but the return must be minute in stating facts, showing why the party did not do the act required. *Regina v. Southampton*, 1 *Ellis, B. & S.* 5. *Equitable defence* to the demands of the relator, and mode of asserting it. *Neuse River Co. v. Commissioners*, 6 *Jones (North Car.) Law*, 204.

¹ *Rex v. Norwich*, 3 *Ld. Raym.* 1244; *S. C.*, 2 *Salk.* 436; *Rex v. Pomfret*, 10 *Mod.* 68; *Rex v. Cambridge*, 3 *T. R.* 461; *Rex v. York*, 6 *Id.* 495; *Wright v. Fawcett*, 4 *Burr.* 2044.

² *Maddox v. Graham*, 3 *Met. (Ky.)* 56, 69, 1859; *Angell & Ames Corp.* secs. 727, 728; *People v. Commissioners*, 6 *Wend.* 559; *People v. Finger*, 24 *Barb.* 341.

³ *Commonwealth v. Allegheny County*, 37 *Pa. St.* 277, 279, *Commonwealth v. Allegheny County*, *Id.* 237, opinion of *Woodward, J.*; *Tapping on Mandamus*, 347; *Tarver v. Commissioners*, 17 *Ala.* 527; *Commonwealth v. Lyndall*, 3 *Brewster (Pa.)* 425; *Id.* 441; *Dane v. Derby*, 54 *Maine*, 95. The statute of 9 Anne, chap. XX. is not in force in Alabama. *Commissioners v. Tarver*, 21 *Ala.* 661. Nor in Maryland. *Harwood v. Marshall*, 10 *Md.* 451.

the questions of law and the issues of facts thus presented will be disposed of according to the statutes and the practice of the court.¹

Peremptory Writ.

§ 707. If the return to the alternative writ be disallowed as insufficient in law, or if the facts averred in the return be found and adjudged untrue, a peremptory writ will be issued, which, as its name implies, requires to be obeyed, and it can not be disobeyed on any ground which might have been urged in resisting the application for the writ.² While it is true that the general rule is that no return can be made to the peremptory writ except obedience, yet a subsequent *valid* statute forbidding obedience or making obedience impossible will from necessity be a sufficient return.³ If the defendants have appeared to a rule or notice of an application for a *mandamus*, and have been heard, and there is no controversy in respect to the facts, and the right of the relator is clear, a peremptory writ may, in the discretion of the court, be issued in the first instance.⁴ Thus, where a specific duty, *e. g.* the levy of a special tax, required to be performed by public officers at a prescribed time, is omitted to be performed without a reason, or for a

¹ *Silverthorne v. Railroad Company*, 88 New Jersey Law, 178. The prosecutor or relator may *demur to the return*. *Ib.* Or *plead to*, and controvert, the facts stated therein. *Maddox v. Graham*, 2 Met. (Ky.) 56, 68, 1859; *People v. Metropolitan Police Board*, 26 N. Y. 816; *State v. Jones*, 10 Iowa, 65; *Fowler v. Pierce*, 2 Cal. 165; 9 *Anné*, chap. XX. secs. 1, 2; *Grant on Corp.* 228-240.

² *Stevens' Case*, T. Raym. 482; *Rex v. Norwich*, 2 Ld. Raym. 1245; *People v. Seymour*, 6 Cow. 579; *Commonwealth v. Pittsburg*, 84 Pa. St. 496, 1859; *Weber v. Zimmerman*, 23 Md. 45; *People v. Supervisors*, 28 N. Y. 112.

³ *Sedberry v. Board of Commissioners, &c.*, 66 North Car. 486, 492, 1872; *Bayne v. Jenkins*, *Ib.* 356.

⁴ *Knox County v. Aspinwall*, 24 How. 376, 1860; *Ex parte Jennings*, 6 Cow. 229; *Ex parte Rogers*, 7 Cow. 526; *State v. Elkinton*, 1 Vroom (N. J.) 385; *Harkins v. Sencerbox*, 2 Minn. 344; *Justices, &c. v. Turnpike Company*, 11 B. Mon. 148; *Board, &c. v. Grant*, 9 Sm. & Mar. 77. So, if no return be made to an alternative writ, the court, instead of proceeding by attachment, may direct the peremptory writ to issue. *State v. Jones*, 1 Ire. 129; *People v. Pearson*, 3 Scam. (Ill.) 271.

reason merely colorable, a peremptory *mandamus*, without a previous alternative, may be issued in the first instance, if the defendant have previously appeared to a notice or rule commanding the duty to be performed *forthwith*.¹ So where the plaintiff's claim has been reduced to a judgment a peremptory writ, *may* be awarded in the first instance.²

§ 708. Although the return is insufficient, yet if upon the whole case it clearly appears that the relator is not entitled to the advantage which the peremptory writ would give him, the court will not issue it.³ If issued, it may, on motion, be set aside, on proof that it was unfairly or improperly obtained, or commands the performance of an illegal act.⁴ If when being issued it is not fully and effectually obeyed, the relator may oppose the motion to file the return.⁵

Attachment.

§ 709. Obedience to the peremptory writ is enforced by attaching the persons guilty of the disobedience for contempt.⁶ If a corporation makes no return to a writ duly issued and served, the attachment issues against the individuals guilty of the contempt in their natural capacity.⁷ If the writ be directed to several persons in their natural capacities, unless all join in the return, the attachment must go against all, though such as were willing to do the act commanded will not be punished. But where the writ is directed to a corporation by name, the attachment should

¹ Knox County v. Aspinwall, 24 How. (U. S.) 376, 1860.

² Lutterloh v. Board of Commissioners, &c., 65 North Car. 403, 1871.

³ Willc. 444, pl. 303, citing Rex v. Campion, 1 Sid. 14; Rex v. Mayor, &c., Cowp. 523; Rex v. Griffiths, 5 B. & Ald. 735; *supra*, sec. 683.

⁴ People v. Everett, 1 Caines (N. Y.) 8; Weber v. Zimmerman, 28 Md. 45; State v. County Judge, 12 Iowa, 337.

⁵ Rex v. Ipswich, 2 Ld. Raym. 1283.

⁶ Commonwealth v. Taylor, 36 Pa. St. 263, which contains C. J. Lowrie's address on behalf of the Supreme Court of Pennsylvania to the members of the municipal council of Pittsburgh, attached for contempt for not levying, as commanded, a tax to pay creditors; Loute v. Allegheny County, 10 Pittsburgh Legal Journal, 241; Angell & Ames, sec. 780; Willc. 448.

⁷ Mills' Case, T. Raym. 152.

issue against the guilty only, not against those who do all in their power to obey the command of the writ.'

§ 710. The *application for an attachment* is by motion for a rule *nisi*, founded upon affidavits, which gives the defendant an opportunity to show cause.¹ But the rule is here often dispensed with, and upon a clear showing that the writ has been served, and that the disobedience is willful, or the contempt gross, an attachment may be issued at once.

§ 711. The defendants cannot, on being attached for disobedience to a peremptory *mandamus*, issued by a *federal court*, excuse or justify such disobedience by showing that they have since been enjoined by a *state court* from doing the act commanded by the former court.'

Judgment in Mandamus.

§ 712. A *change in the membership* of a municipal council pending proceedings in *mandamus* against the

¹ *Bailiffs of Bridgenorth*, 2 Stra. 808; *Rex v. Salop*, Buller's *Nisi Prius*, 198, 201 (b.); *New Sarum*, Comb. 327.

² *Tidd's Prac.* 484; *Chaunt v. Smart*, 1 B. & P. 477. Under the practice at common law, an attachment is not granted for not making a return to the peremptory writ on the day assigned, but it is granted after a peremptory rule to return the writ. *Rex v. Fowey*, 5 D. & R. 614; *Coventry's Case*, 2 Salk. 429; *Willc.* 449.

If there has been *no service of the writ* according to law, an attachment for contempt will not be issued. *State v. Supervisors, &c.*, 22 Wis. 396, 1867.

If a "town council" to which a *mandamus* is directed adjourn the corporate assembly to prevent a return being made, the members will be punishable for contempt. *Regina v. Heathcote*, 10 Mod. 56. To a rule to show cause why officers of a county should not be attached for contempt in not levying as commanded a tax sufficient to pay the plaintiff's claim against a county, it was held a good answer that a sufficient tax had been levied and the lists placed in the hands of the collecting officer. *Johnson v. Board of Commissioners, &c.*, 67 North Car. 101, 1870. Discretion of officers as to raising part by taxation and part by the issue of bonds. *Id.* See *Sedberry v. Board, &c.*, 66 North Car. 486.

³ *Riggs v. Johnson County*, 6 Wall. 166; *Lansing v. County Treasurer*, 1 Dillon C. C. 522; *Supervisors v. Durant*, 9 Wall. 415; *The Mayor v. Lord*, 1 b. 409. A town treasurer, who has collected the money due a judgment creditor, cannot be compelled by *mandamus* to pay it to the creditor while enjoined at the suit of another. *State v. Kispert*, 21 Wis. 387.

council does not abate the proceedings; and where such a change occurred, and the new members were made parties, and afterwards a peremptory writ ordered, this was regarded as in effect a judgment against the corporation, and binding upon the councilmen in office at the time of its rendition, and whose duty it was to execute it.¹ But a judgment in *mandamus*, ordering the performance of an official duty, by one who had ceased to be an officer before the judgment was entered, is void, and does not bind his successor if the latter be not made a party to the proceeding and have due notice thereof and opportunity to be heard.² Strangers are

¹ *Maddox v. Graham*, 2 Met. (Ky.) 56, 63, 71, 1859; *Louisville v. McKean*, 18 B. Mon. 9, 13, 1857. In the last case, the city of Louisville was held entitled to prosecute an appeal in its name from a proceeding in *mandamus* against the mayor and the members of the council of the city. In thus holding, the court, by *Simpson, J.*, remarks: "The act they [the mayor and council] were required to perform was a corporate act. The judgment against them should, therefore, be regarded as having been rendered against them in their corporate character. Indeed, the proceeding should properly have been against the corporation, or against the general council, as that body represented the corporation. If it should be regarded as a proceeding against the mayor and general council individually, the judgment might have been unavailing if they had not been in office at the time it was rendered; and might, therefore, have been made ineffectual by their resignation during the pendency of the motion. But regarding it as a proceeding against the corporation, it would be obligatory on the members of the general council in office at the time of its rendition; and it would not assume the character of a proceeding against individuals, unless it became necessary to issue an attachment for the enforcement of the judgment. Therefore, the appeal is properly prosecuted in the name of the city." In *Soutter v. Madison*, 15 Wis. 30, it was held that if the mayor and part of the council go out of office after the alternative writ is served, their duties devolve on their successors, and that the peremptory writ may be directed to the mayor and council generally.

Where a writ is ordered against the board of commissioners of a county and there is a change of membership after the writ is awarded and before it is served, it must be obeyed by those who compose the board at the time when the duty to act arises. *Pegram v. Commissioners*, 65 Nor. Car. 114, 1871.

² *The Secretary of the Interior v. McGarrahan*, 9 Wall. 298, 313, 1869. In such a case the officer is treated as the real defendant, and notice to him, actual or constructive, is essential to jurisdiction. *Per Olifford, J., Id.* See *Regina v. Eye* (mayor of), 9 A. & E. 676; *State v. Gates*, 22 Wis. 210; *Beachy v. Lamkin*, 1 Idaho, 48; *Soutter v. Madison*, 15 Wis. 30; *State v. Elkinton*, 1 Vroom (N. J.) 335.

neither bound, nor estopped, by a peremptory writ of *mandamus*.¹

¹ *Regina v. Heathcote*, 10 Mod. 56; S. C., Fort. 290; Tapping, 403.

Error and Appeal from Judgment in Mandamus—Supersedeas. State v. Judge, &c., 21 La. An. 741; *United States v. Addison*, 23 How. 174; *The Secretary v. McGarrahan*, *supra*; *Louisville v. McKean*, 18 B. Mon. 9, 13; *supra*, sec. 703; *Ex parte Morris*, 11 Gratt. (Va.) 292, 1854; *Insurance Company v. Wheelwright*, 7 Wheat. 534; Tapping, 397, 398, and cases cited; *Moses*, chap. XXVIII.; *Griffin v. Steele*, 1 Edm. (N. Y.) Sel. Cas. 505; *Ex parte Milwaukee Railroad Company*, 5 Wall. 188; *People v. Supervisors*, 28 N. Y. 112; *Chance v. Temple*, 1 Iowa, 179; *State v. County Judge*, 7 Iowa, 186; *Harwood v. Marshall*, 9 Md. 83; *Blackerby v. People*, 5 Gilrn. (Ill.) 206; *supra*, sec. 682, note. In England, see Act 6 and 7 Vict. chap. LXVII. printed in Rawlinson Corp. Appendix, 730; 15 and 16 Vict. chap. LXXVI.

CHAPTER XXI.

QUO WARRANTO.

§ 713. In England, the ancient method of proceeding against those who exercised any public franchise without the King's grant, or contrary thereto, was by the writ of *quo warranto*, which is the foundation of the modern, more convenient, and improved remedy, by information in the nature of a *quo warranto*.¹ In the ninth year of the reign of Queen Anne, the famous statute on the subject of *informations in the nature of a quo warranto, in cases of usurpations or intrusions into the offices and franchises of municipal corporations*, was passed. In substance, this statute has been very generally re-enacted in this country.² It may be considered as settled, that where any public trust or franchise is exercised without authority, an information will be granted for usurping

¹ Willc. 453; Selwin's *Nisi Prius*, 872; 2 Kyd on Corp. 395; Angell & Ames, chap. XXI; Buller's *Nisi Prius*, 210; 3 Blackst. Com. 262; Stephens' *Nisi Prius*, 2429.

² *People v. Thompson*, 16 Wend. 655, 1837. The cases in which *quo warranto* lies, and the nature and mode of proceeding, pleading, practice, and judgment will be found discussed, and the authorities collected by the reporter, in a valuable note to *The People v. Richardson*, 4 Cow. (N. Y.) 100-123. *Infra*, sec. 726. See, also, Stephens' *Nisi Prius*, 2430-2480. In *South Carolina*, the statute of 9 Anne, chap. XX. is in force, and usurpations by public corporations of unauthorized powers may be tried upon information. *State v. Charleston*, 1 Const. R. 36, 1817; approving, *Rex v. Mayor of Genterden*, 8 Mod. 114. See, also, *State v. Commissioners*, 1 Const. (South Car.) R. 1817, 55, 62. In *Louisiana*: *Reynolds v. Baldwin*, 1 La. An. 162. In *Pennsylvania*: *Commonwealth v. Jones*, 12 Pa. St. 365, 1849; *Commonwealth v. Central Passenger Railway Company*, 52 Pa. St. 506; 9 Anne, chap. XX. now in force; *Commonwealth v. Cluley*, 56 Pa. St. 270, 1867. In *New York*: *People v. Utica Insurance Company*, 15 Johns. 358; *Attorney General v. Same*, 2 Johns. Ch. 371; 4 Cow. 101, 122, 133. In *Massachusetts*: *Goddard v. Smithett*, 3 Gray, 116. In *New Jersey*: *State v. Turnpike Company*, 1 N. J. 9; *State v. Tolan*, 33 N. J. Law, 195, 1866. In *Iowa*: *Cochran v. McCleary*, 22 Iowa, 75, 1867. In *Ohio*: *State v. Cincinnati Gas Company*, 18 Ohio St. 262. In *Maine*: 9 Anne, chap. XX. not in force; *Dane v. Derby*, 54 Maine, 95, 1866. Practice in that state. *Id.*

it, whether it be a prior franchise of the crown or one exercised under an act of parliament. Thus, where by private act of parliament for enlarging and regulating a port, several persons were appointed trustees, and a particular method of filling vacancies was prescribed, and the defendants took upon themselves to act as trustees without such an election as the statute required, leave was given to file an information in the nature of a *quo warranto* against them.'

§ 714. Under the legislation and practice in the different states in this country, an information in the nature of a *quo warranto* is the appropriate remedy both for the usurpation of *municipal and other public offices*, and for the usurpation of a *public franchise*.¹ Thus this remedy will lie to test the right of a member of a city council to a seat in that body,² or to test the right of a person to preside over or to vote in a meeting of a municipal body.³ In such cases, *ordinarily*, equity has no jurisdiction.⁴

¹ *Rex v. Nicholson*, 1 Stra. 299; see, also, *Rex v. Bedford*, 1 Barnard. 242, 280; *People v. Utica Insurance Company*, 15 Johns. 358, 388, 1818; *Buller's Nisi Prius*, 210. Various instances in which *quo warranto* informations, in England, have been exhibited against a corporate officer, to show by what authority he held a franchise which he assumed to exercise in his official capacity, are collected and stated in *Stephens' Nisi Prius*, 2442, 2443.

² *Reynolds v. Baldwin*, 1 La. An. 162, 1846; followed, *Cochran v. McCleary*, 22 Iowa, 75, 1867. *Ante*, secs. 210, 218, and cases cited, sec. 680; *Rex v. Williams*, 1 Burr. 407; S. C., 2 Kenyon, 75; *State v. Delieesseline*, 1 McCord (South Car.) 52, 1821.

³ *Commonwealth v. Meeser*, 44 Pa. St. 841; S. C., *Brightley's Election Cases*, 659.

⁴ *Reynolds v. Baldwin*, 1 La. An. 162, 1846; *Cochran v. McCleary*, 22 Iowa, 75, 1867. *Ante*, sec. 210.

⁵ *Ante*, ch. X., sec. 210. But see, sec. 213; *People v. Galesburg*, 48 Ill. 485, 1868; *Markle v. Wright*, 18 Ind. 548, 1859; *Hagner v. Heyberger*, 7 Watts & Serg. 104, 1844.

The holding of an election will not be enjoined, since *quo warranto* is a complete remedy. *People v. Galesburg*, 48 Ill. 485, 1868. Where the remedy at law is inadequate, a Court of Equity may, for that reason, take jurisdiction. *Ib. obiter. Ante*, sec. 213. The governor will not be restrained from granting a commission to an officer who has been improperly elected, any more than the courts would restrain the legislature from passing an unconstitutional act. *Grier v. Taylor*, Governor, 4 McCord (South

§ 715. In a previous chapter we have had occasion to consider when statutes providing special proceedings with respect to *municipal elections* will or will not be held to oust *the revisory or superintending jurisdiction of the Superior Courts* over such proceedings and elections, and we may here repeat that this salutary jurisdiction should not be deemed to be taken away, except in cases where the legislative intent to this effect is plainly manifest.¹

§ 716. We have before seen that it is the doctrine of the English law, quite generally adopted in this country, that where a *person is in the actual possession of an office under an election or a commission*, and is thus exercising its duties *under color of right*, that the validity of his election or commission cannot, in general, be tried or tested on a *mandamus* to admit another, but only by an information in the nature of a *quo warranto*.² The certificate of elec-

Car.) 206, 1827, *per Bay, J.*; *Chicago v. Evans*, 24 Ill. 52, 1860; *Smith v. McCarthy*, 56 Pa. St. 359.

¹ *Ante*, sec. 139, *et seq.*

The cases discover some conflict of opinion in respect to when a special mode of contesting elections will exclude the mode by *quo warranto*. See on this subject, *State v. Marlow*, 15 Ohio St. 114, 1864, *Commonwealth v. Garrigues*, 28 Pa. St. 9; *Commonwealth v. Baxton*, 35 Pa. St. 263; *Commonwealth v. Leech*, 44 Pa. St. 332; *Commonwealth v. Meeser*, 44 Pa. St. 341; 8. C., *Brightley's Election Cases*, 659, 663, which the learned editor of the volume last cited regards as in conflict with the *Commonwealth v. McCloskey*, 2 Rawle (Pa.) 369, two judges dissenting; approved, *People v. Holden*, 28 Cal. 123. *Ante*, secs. 141, 142, 143, 144; *Steele v. Martin*, 6 Kansas, 430. *Post*, sec. 740.

² *Ante*, sec. 141, and note; secs. 674, 678-682; *Regina v. Leeds*, 11 A. & E. 512; *Regina v. Derby*, 7 A. & E. 419; *Regina v. Chester* (Mayor, &c.), 5 EL & BL 531; *Ohio v. Moffitt*, 5 Ohio, 358; *Warner v. Meyers*, 3 Oregon, 218, 1870; *State v. Choate*, 11 Ohio, 511; *State v. Bryce*, 7 Ohio, part 2, p. 82; *People v. New York*, 8 Johns. Cas. 79, 1802 (*mandamus* to admit aldermen). In the case last cited, the *reason for the rule* is thus stated by the court: "Where the office is already filled by a person who has been admitted and sworn, and is in by color of right, a *mandamus* is never issued to admit another person; because the corporation, being a third party, may admit or not, at pleasure, and the rights of the party in office may be injured, without his having an opportunity to make defence. The proper remedy, in the first instance, is by information in the nature of a *quo warranto*, by which the rights of the parties may be tried." 8 Johns. Cas. 79, 90. See, also, *People v. Sweeting*, 2 Johns.

tion of an officer, or his commission, coming from the proper source, is *prima facie* evidence in favor of the holder, and in every proceeding, except a direct one to try the title of such holder, it is conclusive; but in *quo warranto* the court will go behind the certificate or commission, and inquire into the validity of the election or appointment, and decide the legal rights of the parties upon full investigation.¹

184; *People v. Van Slyck*, 4 Cow. 297, 323; *Stephens' Nisi Prius*, 2445, *et seq.* where the validity and invalidity of corporate elections are fully treated.

¹ *People v. Van Slyck*, 4 Cowen, 297, 1825; *People v. Vail*, 20 Wend. 12, 1838; *People v. Richardson*, 4 Cow. 100, 101, note; *Id.* 297; *People v. Seaman*, 5 Denio, 409, 1848; *State v. Marston*, 6 Kansas, 524, 1870; *Low v. Towns, Governor, &c.*, 8 Geo. 360, 1850; *Pitts v. Bonner*, 7 *Id.* 449. *Ante*, sec. 141, and note; secs. 143, 144, 160, 682.

In the *People v. Van Slyck*, *supra*, which was an information in the nature of a *quo warranto* against one intruding into an office by reason of an unlawful decision of the board of canvassers, *Woodworth, J.*, said: "It was contended on the argument that the decision of the board of canvassers was conclusive until reversed, and could only be reviewed by *certiorari*. [See, *post*, chap. XXII. sec. 739; *ante*, sec. 141.] This objection cannot prevail. They are required by the act to attend at the clerk's office, and calculate and ascertain the whole number of votes given at any election, and certify the same to be a true canvass. This is not a judicial act, but merely ministerial. They have no power to controvert the votes of the electors. If they deviate from the directions of the statute, and certify in favor of an officer not duly elected, he is liable to be ousted on an information in the nature of a *quo warranto* where the trial is had upon the right of the party holding the office. The court will decide, upon an examination of all the facts." 4 Cow. 297, 323.

Effect of choosing or electing a *disqualified* person. *Ante*, sec. 135; *Commonwealth v. Cluley*, 56 Pa. St. 270, 1867; *Stephens' Nisi Prius*, 2454.

Acts of officers de facto are valid, unless directly questioned by proceedings against them. *Burke v. Elliott*, 1 *Ire. Law*, 855; *Burton v. Patton*, 2 *Jones (North Car.) Law*, 124. Difference between *de facto* and *de jure* officers is well stated by *Ruffin, C. J.*; *Id.* *Stephens' Nisi Prius*, 2448. See, also, *ante*, sec. 160, note; secs. 211, 212, 214; *State v. Tolan*, 33 *N. J. Law*, 195, 1868. For an exhaustive and most valuable review of the English and American authorities upon the question *what is essential to constitute an officer de facto*, see the learned opinion of *Butler, C. J.*, delivering the judgment of the Supreme Court of Connecticut, in the *State v. Carroll*, with note of Judge *Redfield*, 12 *Am. Law Reg. (N. S.)* March, 1873, p. 165; *S. C.*, 38 *Conn. R.* 449. It was held in this case, that where judges were by the constitution required to be elected by the General Assembly, and a judge of a city court

§ 717. In a proceeding by information in the nature of a *quo warranto* the defendant must either disclaim or justify. If the disclaims, the people are at once entitled to judgment. If he justifies, he must set out his title specifically. It is not enough to allege generally that he was duly elected or appointed to the office. He must plead facts, showing on the face of the plea that he has a valid title to the office. The people or state is not bound to show anything. Therefore, it is no answer to the information that the relator is not entitled to the office. The defendant is called upon to show by what warrant he exercises the functions of the office; he must exhibit good authority, or the state is entitled to a judgment of ouster.¹

§ 718. In England it was held, in *Rex v. Saunders* (in which an information in the nature of a *quo warranto* was moved against the defendant, to show by what authority he claimed to be an alderman of Taunton), where the relator showed that the corporation was dissolved and extinct, and that no corporate body in fact existed, or claimed to exist, at the time of the application, that the information should be refused.¹ This case was referred to in South Carolina,

was so elected, and where it was further provided by law, that in case of his absence or sickness, a justice of the peace should temporarily hold the city-court, that the judgments of such justice were not void; that he was an officer *de facto*, if not *de jure*, and that he was a *de facto* officer even if the law authorizing him to act was unconstitutional. The court distinctly decided that the acts of an officer appointed pursuant to an unconstitutional law, and before its unconstitutionality has been adjudged, are valid as respects the public and third persons. See, also, *State v. Douglass*, 50 Mo. 593.

¹ *Clark v. People*, 15 Ill. 213, 1853; *Cole on Crim. Inf.* 210, 212; *Willc.* 486, 487, 488, where the requisites of pleas are stated; *Angell & Ames on Corp.* sec. 756; *Stephens' Nisi Prius*, 2431, 2464; 2 Kyd, 399. It is not sufficient for the defendant to aver that he is "duly elected." *Commonwealth v. Gill*, 3 Whart. (Pa.) 228.

² *Rex v. Saunders*, 3 East, 119, 1802. In this case the relator, in 1802, stated that the defendant had been elected alderman in 1788, and that the corporation was dissolved in 1792, since which no acts had been attempted to be done by the corporate body, but that the defendant had made his appearance at Taunton at the last election for members of parliament, and had there claimed, as alderman, to be returning officer, and had received votes as such, and had executed a separate return. Lord *Ellenborough*, C. J., delivering the judgment of the court, observed that "the corporation being

and the opinion expressed that *quo warranto* would not lie against one claiming office under a private corporation which has no legal existence.¹ In New York, however, it is expressly decided that *the question whether a municipal or public corporation has been legally created or erected*, may be tested in an action or proceeding in the nature of *quo warranto* brought against any one exercising an office in such corporation.¹

stated to be actually dissolved, and no corporate body claiming to be such, in existence, the act of this individual person was a mere nullity, and of no more effect than if a mere stranger had come into the town and claimed to be an alderman and returning officer. Here are no civil rights in controversy, which would warrant the court to interfere by their own authority; but what he claimed was a mere nullity; there was no such office in existence, and therefore no ground for our interference," and the rule was refused.

¹ *State v. Lehre*, 7 Rich. (South Car.) Law, 234, 324, 1854, *per Glover, J.*, who said: "It was contended, in argument, that there was no corporation, and that the election [for bank directors and president] is therefore void. If no corporation exist, it would be nugatory and fruitless to proceed any further in the *quo warranto*, and call in question a harmless and pretended claim, where no civil right is in controversy. If there was no such corporation, there was no such officer, and would be, as was said by Lord *Ellenborough*, in *Rex v. Saunders* (8 East, 119), as if a stranger had come into town and claimed to be president or director."

² *People v. Carpenter*, 24 N. Y. 86, 1861. This action was in the nature of *quo warranto* in the name of the people, and was brought to test the right of the defendant to exercise the duties and powers of supervisor of the town of Afton, and the case turned upon the sole point whether that town had been legally created. It was contended in argument that *this form of action* was not the appropriate remedy to bring up for decision that point. Defendant's argument was, that if there was, as the plaintiffs allege, no such town as Afton, then it was impossible that defendant should exercise the duties of an office which had no existence. "But," says *Davies, J.*, "we think the objection too technical. The object of the framers of the code, in the provisions in reference to these actions, manifestly was to provide a speedy and effective mode of determining the claims of persons to exercise the duties of any office within this state, and this necessarily involves the determination of the existence of the particular office." See, also, where same view was taken, *The People v. Draper*, 15 N. Y. 532, an action of like character, to test right of the defendants to the office of police commissioners under the metropolitan police district act. And see note in 4 Cow. 100 *et seq.*; *State v. Ind. School District*, 29 Iowa, 264, 1870.

In Massachusetts, it was held that where a new county had been created by an act of the legislature which contained a provision that it should not

In Missouri it is admitted, in the opinion of the judge who delivered the judgment of the court, that in a proceeding in the nature of *quo warranto* against the trustees of a town to oust them from exercising the powers of such trustees on the ground that the town was not *legally* incorporated, the question of the existence or non-existence of the supposed town corporation may be put in issue; and it is furthermore admitted that, if in such case there is no corporation either *de facto* or *de jure*, the relator would be entitled to judgment; but it is held that where the town corporation is actually in existence under the order of a court, regular on its face, establishing it, that the question whether such order was procured by fraud or was void because the petition for the incorporation was not signed by the requisite number of taxable inhabitants, cannot be inquired into and determined in a proceeding against the trustees, but only, it is to be inferred, in a direct proceeding against the corporation itself.¹

§ 719. It is held, in England, that if the information be take effect until a future day mentioned, that an appointment by the governor to an office for such county, before the act took effect was void, and that an information in the nature of a *quo warranto* would lie to remove the appointee. *Commonwealth v. Fowler*, 10 Mass. 290, 1813; S. C., 11 *Id.* 339.

¹ *State v. Weatherby*, 45 Mo. 17, 1869. It may be suggested in reference to the opinion in this case, that notwithstanding what is said on this subject in the opinion, the logical effect of the decision seems to be that the question whether a corporation has been legally created or not cannot be tried in proceedings against persons assuming to act as officers in such a corporation. The London Law Times, January 25, 1873, referring to sec. 718 of the text, remarks: "A curious example of the different views which have been taken in the two countries is afforded by *quo warranto* informations where no corporation exists. It has been held in England in *Rex v. Saunders*, 3 East, 119, and more recently in *Reg. v. Lloyd*, 6 Law Times Rep. N. S. 610, that the information may go where there is no corporation in existence. *Rex v. Saunders* was referred to in a case in South Carolina, and the opinion was expressed that *quo warranto* would not lie against one claiming office under a private corporation which has no legal existence. But in New York the English doctrine was accepted, it being expressly decided (*People v. Carpenter*, 24 N. Y. 86) that the question whether a municipal or public corporation has been legally created or erected may be tested by an action or proceeding in the nature of *quo warranto* brought against any one exercising an office in such corporation."

for using a franchise by a corporation, it should be *against the corporation*; but if for usurping to be a corporation, it should be *against the particular persons* guilty of the usurpation.¹ In Ohio, under the statutes of the state, the proceeding to question the franchise of being a private corporation must be against the individuals who usurp the franchise; and information in the nature of *quo warranto* will not lie against a *de facto* corporation, in its assumed corporate name, to compel it to show by what title it exercises the franchise to be a corporation; the court admitted, however, that in such cases municipal corporations might be an exception, but the point was not decided.²

§ 720. In no instance have the courts of this country declared *forfeited the charter or franchises* of a municipal corporation *for the acts or misconduct of its agents or officers*. That this was done by the English courts prior to the revolution of 1688 is well known. The case of the city of London is the most conspicuous historical example. It is believed that such a remedy is not applicable to our corporations, created, as they are, by statute, for the benefit not of the officers or a few persons, but of the whole body of the inhabitants residing therein and the public. If the officers usurp rights which belong to the state, the law, by injunction, by action, by declaring their acts void, and in other ways, can correct the usurpation, and should do it,

¹ *Rex v. Cusack*, 2 Roll. R. 113, 115; 4 Cow. 109, note. See Mr. Willcock's observations; Willc. 500, pl. 488.

² *State v. Cincinnati Gas Company*, 18 Ohio St. 262; *Commonwealth v. Central Passenger Railway*, 52 Pa. St. 506. *Scott, J.*, in the first case says this question was left open in the *City of London's Case*, 8 How. St. T. 1039, and seems to have been decided otherwise in *Rex v. Chester*, cited 2 Term R. 565, but that in this country the weight of authority is otherwise. *People v. Railroad Company*, 15 Wend. 114; *People v. Richardson*, 4 Cow. 97, 109, note; *Angell & Ames*, sec. 756. And he admits that municipal corporations may be an exception, because the inhabitants of the place may be so numerous that it would be impossible to proceed against them individually.

Judgment in *quo warranto* against a municipal corporation and officers therein acting under a charter which had not legally been accepted by reason of fraudulent voting. *State v. Bradford*, 32 Vt. (3 Shaw) 50. Acceptance of charter. *Ante*, sec. 23.

without forfeiting the rights and franchises of the citizens who are blameless.¹

§ 721. We have elsewhere treated of the mode in which illegal corporate acts may be prevented, and the remedies afforded by the law in respect thereto;² but it may be here observed that an information in the nature of a *quo warranto* may, in proper cases, be resorted to as a remedy for the illegal usurpation, by a municipal corporation, of the powers not granted to it by its charter or the law. Thus, in South Carolina, it has been adjudged that the right of a municipal corporation to exercise public powers, as, for example, its right under its charter to tax certain descriptions of property, may be determined on an information in the nature of a *quo warranto*, filed by the attorney general against the corporation.³ But in Massachusetts it is held

¹ See, on this subject, *Commonwealth v. Pittsburg*, 14 Pa. St. 177, 1850. *Ante*, chap. VII. on the Dissolution of Municipal Corporations, secs. 109, 110, 111, 112; *City of London's Case*, *ante*, chap. I. sec. 8.

A municipal corporation cannot, in any collateral proceeding, be declared or held to have forfeited its charter for non-user or other cause; it retains its corporate character until it is repealed or the forfeiture declared by direct judicial proceeding. *Harris v. Nesbit*, 24 Ala. 398, 1854 (ferry controversy). Under the code of Alabama, an information in the nature of a *quo warranto* will not lie to vacate the charter of a municipal corporation on account of the passage of unauthorized ordinances by the council. *State, &c. v. Town Council*, 30 Ala. 66, 1857. Performance of omitted duty cannot be enforced by *quo warranto*, as judgment of forfeiture would be inapplicable. *Attorney General v. Salem*, 103 Mass. 138, 1869.

² *Post*, chaps. XXII. XXIII.

³ *State v. Charleston*, 1 Const. R. 36, 1817; *Buller's Nisi Prius*, 212. See in Iowa, *State v. Lyons*, 31 Iowa, 482, 1871, where the nature of the remedy was discussed, and it was held that proceedings in *quo warranto* will not be entertained for the purpose of annulling a city ordinance passed in the irregular and improper exercise of a power conferred by law. In Illinois, it has been held that the constitutionality of an act extending the corporate boundaries, cannot be tried in *quo warranto*, questioning the right of the city officers to act within the extended boundary. *People v. Whitcourt*, 55 Ill. 172, 1870.

Quo warranto will not lie against a corporation for taking land without making compensation as required by law—trespass is the remedy. *People v. Hillsdale, &c. Company*, 2 Johns. 190, 1807. As to remedy, see chapter on *Mandamus*, *ante*.

Simple error of judgment on the part of officers of municipal corpora

that an information in the nature of *quo warranto* will not lie against a municipal corporation to enforce the performance of a corporate duty neglected by the corporation; the court distinguish between such neglect and the usurpation of a franchise not granted, but remark that they "do not feel called upon to consider whether under our political system this remedy can under any circumstances be maintained against a municipal corporation."

§ 722. In proceedings in the nature of *quo warranto*, the rule to show cause is not grantable of course, but depends upon the *sound discretion of the court*. It will not be granted in all cases, though the incumbent be ineligible and the relator have sufficient interest to prosecute; the court will look at the relator's motive and the public good in the exercise of the discretion confided to it.¹ Accord-

tions as to the extent of their powers, will not authorize the court, on *quo warranto*, to declare a forfeiture of their offices. *State v. Town Council*, 30 Ala. 68, 1857.

¹ *Attorney General v. Salem*, 103 Mass. 138, 1869, *per Morton, J.*

² *Commonwealth v. Jones*, 13 Pa. St. 365, 1849; *Commonwealth v. Cluley*, 56 Pa. St. 270, 1867; *Rex v. Parry*, 6 Ad. & El. 810; 2 N. & P. 414; *Rex v. Brown*, 3 Term R. 574; *Rex v. Wardroper*, 4 Burr. 1964; *Rex v. Dawes*, *Ib.* 2022; *Rex v. Sargeant*, 5 Term R. 567.

Who may be a relator, and what will constitute a sufficient interest to give a private relator the writ in the case of public right, or to test the right to a public or municipal office. *Commonwealth v. Cluley*, 56 Pa. St. 270, 1868, and cases cited, as to right of *defeated candidate* to bring *quo warranto* against the successful candidate; *Commonwealth v. Jones*, 13 Pa. St. 365, 1849; *Commonwealth v. Meeser*, 44 Pa. St. 341, 1863; S. C., *Brightley's Election Cases*, 659, and note, and cases cited. See also, as to interest of relator, *Brightley's Election Cases*, 146, 289, 664; *Eaton v. State*, 7 Blackf. 65, 1843; *State v. Schnierle*, 5 Rich. (Law) 299, 1852. Must be in the name of the attorney general. *Ib.* *A vote in a city* was held to have a sufficient interest in the due election of members of the city council to become the relator in *quo warranto* against persons exercising the duties of councilmen. *State v. Tolan*, 38 N. J. Law, 195, 1868. *Post*, sec. 730, *et seq.*

See, also, as to relator: *Rex v. Hodge*, 2 B. & A. 344; *Rex v. Parry*, 6 A. & E. 810; *Rex v. Quayle*, 11 A. & E. 508; *Rex v. Ogden*, 10 B. & C. 210; *Rex v. Marten*, 4 Burr. 2120; *Rex v. Trevenen*, 2 B. & A. 482; *Rex v. Slythe*, 6 B. & C. 242; *Regina v. Anderson*, 2 Q. B. 740; *Regina v. Greene*, 2 Q. B. 460. See rule of Queen's Bench of November 8, 1839; 11 A. & E. 2; *Rawlinson on Corp.* (5th ed.) 359, 360; *Willc.* 476; *Stephens' Nisi Prius*, 2483.

ingly, a rule was refused against the defendant, the acting mayor, where it appeared there was no adverse claimant to the office.¹ So the court refused to allow an information in the nature of a *quo warranto* where the election day was suffered to lapse, and the election was held in good faith on the wrong day.²

§ 723. In England there is a discretion in the court to grant an information in the nature of a *quo warranto* although the case cannot be tried until *the term of the officer is at an end*, satisfactory reasons for the delay being given; and it has even been granted though the office be determined at the time the application for the information is made.³ In this country the authorities are conflicting. In some of the states it has been held that an information will not be granted when it is not possible to enter a judgment before the term of the officer proceeded against expires. In other cases it has been adjudged, and we think correctly, that *quo warranto* may be properly brought during the official term of the officer, and if so brought, that it may be tried, and the proper judgment entered afterwards. In North Carolina the doctrine of the English courts above mentioned has been followed, and it has not been considered absolutely necessary that the information should be applied for while the defendant is continuing to hold the office. The cases on this subject are referred to in the note.⁴

¹ *State v. Schnierie*, 5 Rich. (South Car.) Law, 299, 1852.

² *State v. Tolan*, 83 N. J. (Law) 195, 1868. The requirement to give notice of the regular annual election, of which the time is fixed by charter, is directory. *People v. Hartwell*, 12 Mich. 508, 1864; *People v. Wetherell*, 14 Mich. 48. *Ante*, sec. 136; secs. 156-160; sec. 675; *Stephens' Nisi Prius*, 2446, 2447.

³ *Rex v. Williams*, 1 W. Black. 95; *Rex v. New Radnor*, 2 Ld. Kenyon's Notes, 498; *Rex v. Harris*, 6 Ad. & El. 475 (33 Eng. C. L. 117); *Rex v. Powell*, Sayer, 239; *Rex v. Warlow*, 2 M. & S. 76; *Rex v. Payne*, 2 Chitty, 367; *Angell & Ames*, sec. 744. Present state of legislation and adjudications in England on the effect of delay in commencing proceedings. *Rawlinson on Corp.* (5th ed.) 857; *Stephens' Nisi Prius*, 2432. The most recent case is *Reg. v. Blizard*, Law Rep. 2 Queen's Bench, 634, where it is held that although the officer had disclaimed, the relator was entitled to judgment of ouster.

⁴ "The resignation of the incumbent, or even the termination of his

§ 724. Under the statute of 9 Anne, Chap. XX. sec. 4, re-enacted in many of the states literally or in substance, it is settled that there must be some *act* of usurpation—a *user* or *possession* of the office or franchise—to authorize an information in the nature of a *quo warranto*. It is not sufficient to allege *merely* that the defendant *claims* to use or exercise the office or franchise.¹

§ 725. The *judgment of ouster on quo warranto*, until reversed conclusively and finally determines the right as to all persons whomsoever; and it may be given in evidence

office, will not prevent the information being prosecuted to a final judgment, if the proceedings were commenced prior to the resignation, or the expiration of the term." *Per Wagner, C. J.*, *Hunter v. Chandler*, 45 Mo. 452, 1870; S. C., 10 Am. Law Reg. (N. S.) 440; *S. P. Commonwealth v. Smith*, 45 Pa. St. 59; *People v. Hartwell*, 12 Mich. 508, 1864. But in *Georgia* it is held that the title to an office will not be tried on *quo warranto*, when at the time of trial the term of office is expired, and no judgment of *ouster* can be rendered. *Morris v. Underwood*, 19 Ga. 559, 1856. In *Massachusetts* an information was refused, for reasons partly peculiar, where the office was annual, and there could be no determination during the year. *Commonwealth v. Althearn*, 8 Mass. 285, 1807; *Howard v. Gage*, 6 Mass. 462. See, also, *People v. Sweeting*, 2 Johns. 184; *State v. Jacobs*, 17 Ohio, 143. Compare *People v. Loomis*, 8 Wend. 896, 1832.

Following the decisions in England, it has been held that an information in the nature of a *quo warranto* may, in certain cases, be filed against public officers after the expiration of their office, or against special commissioners after they have acted. *Burton v. Patton*, 2 Jones (North Car.) L. 124, 1854. In the *King v. Williams*, 1 W. Black. 93, there was a judgment of ouster, although the usurpation (for unlawfully holding a court in the corporation of Denbigh) was not continued to the trial, Lord *Mansfield* observing, "judgment of ouster must be given, lest the defendant repeat the act." *Ib.* 95.

Effect of acquiescence and lapse of time on the remedy by quo warranto. *People v. Oakland Bank*, 1 Doug. (Mich.) 285; *People v. Pontiac Bank*, 12 Mich. 527; *State v. Turnpike Company*, 8 Rh. Is. 521; *State v. Cincinnati Gas Company*, 18 Ohio St. 285, 1868; *Angell & Ames Corp. sec. 743*.

¹ *Rex v. Ponsonby*, 1 Vesey, 1, leading case, where defendants were charged with usurping a municipal office, cited and approved and followed by Supreme Court of New York, in *The People v. Thompson*, 16 Wend. 655, 1837. See, also, *Rex v. Whitwell*, 5 T. R. 86; *Buller's Nisi Prius*, 211; *Willc. on Mun. Corp.* 462, pl. 254, *et seq.*; *Angell & Ames Corp. sec. 744*; *Stephens' Nisi Prius*, 2457. The statute of Anne commences, "If any person or persons shall usurp, or intrude into, or unlawfully hold and execute, the offices of," &c.

by the parties and others, without being pleaded, on an issue involving the rights upon which it has passed.¹

§ 726. It does not belong to a work of this character to treat of the *practice* in proceedings in informations in the nature of a *quo warranto*. This is regulated, to a considerable extent, by the statutes of the different states, which modify, and render more simple, speedy, and effectual, the common law modes of procedure. But the nature of the remedy, and the principles which govern it, remain substantially as at common law, as amended by remedial acts of parliament; and the practice, as near as practicable, is the same as in the King's Bench, except when altered by the legislation of the particular state.² It must suffice to refer the reader to sources of information on this subject.³

¹ *Utica Insurance Company v. Scott*, 8 Cow. 708, 721, 1826, *per Colden*, Senator, and authorities there digested. In Missouri, see *Hunter v. Chandler*, 45 Mo. 452. A former judgment on an individual relation in *quo warranto* by the district attorney was held to be no bar to a public proceeding by the attorney general. *State v. Cincinnati Gas Company*, 18 Ohio St. 285, 1868. And a decree of a federal court enjoining a party from obeying an ordinance does not affect the right of the state, not a party to that proceeding, to proceed by *quo warranto* to test the validity of the ordinance. *Id.*

² *Commonwealth v. Jones*, 12 Pa. St. 365, 1849, where the practice under the act of 1836 is stated. Former practice no longer obtains under code of New York. *People v. Conover*, 6 Abb. Pr. R. 220.

³ Willc. 453, *et seq.*; Angell & Ames, chap. XXI.; 3 Black. Com. 262; Buller's *Nisi Prius*, 210; Stephens' *Nisi Prius*, 2460, 2429, *et seq.* *Rule to show cause*. *Commonwealth v. Jones*, 12 Pa. St. 365. When dispensed with *State v. Gummersall*, 4 Zab. (N. J.) 529, 1854.

Process upon filing information. Willc. 264; *Commonwealth v. Smead*, 11 Mass. 74; *State v. Gummersall*, 4 Zab. (N. J.) 529, 1854. *Forms of Information—Plea and Replication in Proceedings in Quo Warranto*. *People v. Bank of Niagara*, 6 Cow. 196, approving precedent used in the celebrated case against the city of London (3 Hargr. St. Tr. 545), and in *Rex v. Amery* (2 T. Rep. 515). For further forms, see learned and valuable note to the *People v. Richardson*, 4 Cow. (N. Y.) 106, *et seq.* and authorities there cited; *People v. Van Slyck*, 4 Cow. 297. See, also, *Eaton v. State*, 7 Blackf. (Ind.) 65, 1843.

Form of Verdict. *Thompson v. People*, 23 Wend. 537, reversing S. C., 21 Wend. 285.

Form of Judgment of Ouster. 2 Kyd on Corp. 407; 8 Cow. 721; *Commonwealth v. Fowler*, 10 Mass. 290, 1813; S. C., 11 *Id.* 339, where the form of judgment is given. See, also, as to form of judgment, *Miner's Bank v.*

United States, 5 How. (U. S.) 213, 1847. If relators are successful, they are entitled to *costs*, and hence are entitled to a judgment of ouster, although the term of the office in question has expired. *People v. Loomis*, 8 Wend. 396, 1832. *Contra*, *State v. Jacobs*, 17 Ohio, 143. And see *Angell & Ames on Corp.* sec. 745. *Supra*, sec. 723. Judgment, under statute, of ouster against the defendant without passing upon the plaintiff's right. *Gano v. State*, 10 Ohio St. 237.

The refusal of the court to allow a claimant to a public office to file an information is a *final judgment*, reviewable on error, and this, notwithstanding the court has a discretion in granting or refusing leave. *State v. Burnett*, 2 Ala. 140, 1841; *Ethridge v. Hill*, 7 Port. (Ala.) 47.

CHAPTER XXII.

REMEDIES TO PREVENT, CORRECT, AND REDRESS ILLEGAL CORPORATE ACTS.

This subject will be considered in the following order:—

1. Of the Remedy in *Equity*—secs. 727-738.
2. Of the Remedy by *Certiorari*—secs. 739-743.
3. Of the Remedy by *Prohibition*—sec. 744.
4. Of the Remedy by *Indictment*—secs. 745-748.

The remedy by *private action* is treated in the next chapter.

Remedy in Equity.

§ 727. Equity will sometimes interfere to prevent the municipal authorities from transcending, or from making an illegal use of their powers, and relieve against their unauthorized or illegal acts; but on a principle well known in our jurisprudence, there must be some reason to justify a resort to this jurisdiction, such as the want of an adequate remedy at law, multiplicity of suits, irreparable injury, breach of trust, or the like. Usually, the question whether municipal and public corporations are acting, or have acted, within the limits of the authority which the law confers upon them, involves an examination of purely legal principles, unmixed with equity. Therefore, in general, the court of chancery has no jurisdiction to restrain, review, or set aside, even if irregular or illegal, the proceedings of such a corporation. This jurisdiction belongs, except in special cases, which will be mentioned, to the supervisory power and control of the common law courts.¹

¹ *Mayor, &c. of Brooklyn v. Meserole*, 26 Wend. 182, 1841, *per Nelson*, C. J., who admits of only two classes of such cases in which equity has jurisdiction—1, Irreparable injury, and 2, Multiplicity of suits—and approves *Mooers v. Smedley*, 6 Johns. Ch. 28, 1822. See, also, *Heywood v. Buffalo*, 14 N. Y. 534, 1856; *Bank v. Supervisors*, 25 N. Y. 812; *Dows v. Chicago*, 11 Wall. 108, 1870. In *Heywood v. Buffalo*, just cited, the court admit

§ 728. But since these corporations are invested with large powers to enable them to execute specific objects, or to promote the welfare of the people who are subjected to their rule, and since experience shows how prone their officers are to abuse or transcend their rightful authority to the detriment or injury of the inhabitants, and how necessary it

three classes of cases in which equity has jurisdiction: "1. Where the proceedings of the subordinate tribunal will necessarily lead to a multiplicity of actions. 2. Where they lead, in their execution, to the commission of irreparable injury to the freehold. 3. Where the claim of the adverse party to the land is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved, in order to establish the invalidity or illegality." *Per T. A. Johnson, J.*, 15 N. Y. 534, 541. In the *federal courts* it is well known there can be no case of equitable cognizance where there is a plain and adequate remedy at law. *Ib.* *Ewing v. St. Louis*, 5 Wall. 413, 1866, citing with approval, *Mayor, &c. v. Meserole*, and *Heywood v. Buffalo*, above-mentioned; *Hannewinkle v. Georgetown*, 15 Wall. 547, 1872, *post*, § 738. *Ante*, sec. 476, and note.

So, in New Jersey, by a long established practice, *courts of law* are regarded as the proper tribunals to review the irregularities or errors in the acts and proceedings of municipal corporations; but under certain circumstances, equity will entertain jurisdiction for like purposes. *Morris Canal Company v. Jersey City*, 1 Beasley (N. J.) 252, 1859; *State v. Jersey City*, 5 Dutch. 441; *Carron v. Martin*, 2 Dutch. 594, 1857; *State v. Newark*, 1 *Ib.* 399; *Holmes v. Jersey City*, 1 Beasl. 299; *Attorney General v. Paterson*, 1 Stock. (N. J.) 624; *State v. Jersey City*, 1 Vroom, 521; *Ib.* 247; *Bond v. Newark*, 19 N. J. Eq. 376; *Cross v. Morristown*, 18 *Ib.* 305. *Infra*, sec. 741. See, also, *Gartside v. East St. Louis*, 43 Ill. 47; *Oakland v. Carpenter*, 13 Cal. 540, 643; *Intendant v. Pippin*, 31 Ala. 542, 551, *per Stone, J.*; *Baltimore v. Railroad Company*, 21 Md. 50, 1863. When abutter who complains of proceedings in respect to opening and improving streets may resort to equity for relief in Massachusetts. *Whiting v. Boston*, 105 Mass. 89, 1870; *Jones v. Boston*, 104 Mass. 461. *Ante*, sec. 476. *Post*, sec. 739.

As to relief in equity against *forfeitures* under municipal ordinances, see chap. XII. *ante*, sec. 286; chap. XV. sec. 449. Jurisdiction and relief in equity, see Index—*Equity*; 2 Spence Eq. Jurisd. 32.

Injunction—when granted in matters concerning *municipal elections*. *Brightley's Election Cases*, 623, 573. And see chapters on Municipal Officers and *Mandamus, ante*; Index, *Injunction*. Right of county, or the body which represents it, to file bill in Chancery to restrain an *illegal appropriation of a public highway*. *Justices, &c. v. Plankroad Company*, 9 Ga. 475; and compare 15 Ga. 89. See *ante*, chaps. on Dedication and Streets; Index—*Equity, Injunction*. *Varick v. New York*, 4 Johns. Ch. 53.

The subjects of *Mandamus* (*ante*, chap. XX.), and *Quo Warranto* (*ante*, chap. XXI.), are separately treated.

is that the latter should have easy and effectual remedies to restrain or correct municipal excesses of power, the general spirit of the later cases is to favor a relaxation, rather than a strict application of the rule adverted to in the last section, which denies the right to resort to equity if there exists a remedy at law. The state of the law, as moulded by the courts, on the subject of relief against illegal corporate acts, threatened or consummated, can be most satisfactorily ascertained by a general survey of the field of adjudication. Generally speaking, equity will interfere in favor of, or against, municipal corporations, on the same principles by which it is guided in other cases.' For the reason that these

' Attorney General *v.* Corporation of Plymouth, 9 Beav. 67. Accordingly, it was held where the owner conveyed property to a city for a public way, in the confidence of receiving compensation, which the corporation failed to make, that he was entitled to relief. Walker *v.* City Council, 1 Bailey (South Car.) Eq. 443, 1831.

Bill by corporation to set aside *fraudulent grant* by its council. Oakland *v.* Carpentier, 13 Cal. 540. See S. C. subsequently reported. 21 Cal. 642. See, also, O'Brien County *v.* Brown, 1 Dillon C. C. R. 588, bill to set aside fraudulent judgment; Attorney General *v.* Wilson (bill for relief against fraudulent alienation of corporate property), 9 Simons, 30, 1837; affirmed. 1 Cr. & Ph. 1, 1840. It seems that a municipal corporation, in its corporate character, where the alleged illegal action is not aimed at, and cannot affect the *corporate* rights or *corporate* property, cannot maintain an action to restrain or to be relieved against the levy of an illegal tax upon the tax-payers, as where the board of supervisors of the *county* are proceeding to levy and collect an illegal tax upon the taxable property of the citizens of one of the *towns* in the county. Guilford *v.* Supervisors, 18 N. Y. 143, 1855, *per Denio*, J., who says: "The principles affirmed in this court by Lorillard *v.* Town of Monroe, 1 Kern. 392, seem to me, hostile to this action." And see subsequent case of Doolittle *v.* Supervisors, &c., 18 N. Y. 155, and Roosevelt *v.* Draper, 23 *Id.* 318, below-mentioned. *Infra*, sec. 735.

Where the *mayor* is invested with the power of seeing that the charter of the corporation is faithfully executed, this is a duty with which he is entrusted for the common benefit of all the corporators, and gives him the right to select the means best calculated to discharge it, and in the exercise of this right he may, according to the liberal, but somewhat questionable, view of the Supreme Court of Louisiana, in his official name and capacity, *bring suit* to test the legality of the ordinances and to restrain the aldermen or officers of the corporation from issuing warrants or doing acts in violation of the laws of the state or the charter of the city. Genois, Mayor, &c. *v.* Lockett, 13 La. 545, 1838. In Pieri *v.* Shieldsboro', 42 Miss. 493, 1869, the town council passed an ordinance ordering the plaintiff, without show

corporations are intrusted for defined objects, or for public purposes, with large powers, the courts have evinced some anxiety not to allow their authority to be used to oppress the inhabitants within their jurisdiction; and it may safely be affirmed that there is a remedy, by *certiorari*, prohibition, appeal, indictment, civil action, or in equity, for all injurious abuses of power and all invasions of the legal rights of the citizens subjected to municipal control. There can, ordinarily, be no judicial restraint or interference with the *bona fide* exercise of powers, legislative or discretionary in their nature, and which do not violate private rights.' We have had occasion already, to some extent, to state, in connection with special topics discussed, in what cases, and in what mode, corporate acts and proceedings may be judicially examined or reviewed,* but the subject is of sufficient importance to require some further separate consideration.'

§ 729. In respect of *property* held by municipal corporations *in trust, or clothed with public duties*, equity has always asserted its jurisdiction to see that the trusts were

ing any cause for the order, to remove lumber from his private property, and stating that if he failed thus to remove it, the corporate officers would remove or destroy it. It not appearing that it was a nuisance, the court restrained the corporation from interference with the plaintiff's property. It will be observed that the property threatened to be disturbed was personal and the court make no reference to the point whether an action at law for damages would not be an adequate remedy.

Injunction in favor of individuals to prevent the municipal authorities from encroaching upon private property. *Dudley v. Trustees, &c.*, 12 B. Mon. 610; *Varick v. New York (streets)*, 4 Johns. Ch. 53; *Holmes v. Jersey City (streets)* 1 Beasl. (N. J.) 299; *Tainter v. Mayor, &c. (streets)*, 4 C. E. Green (N. J.) 46; *Clark v. Mayor, &c. (destroying mill dam)*, 13 Barb. 32. *Ante*, ch. XVI. on Eminent Domain, sec. 476 and note. L. R. 1 H. L. 34.

* *Ante*, sec. 58; *Infra*, sec. 741; *Hamerick v. Rouse* (county seat removal), 17 Ga. 56, 1855; *State v. Woody*, 1b. 612; *Brodnax v. Groom*, 64 Nor. Car. 244, 1870; *Jenkins v. Andover*, 103 Mass. 94, 104, 1869. *Post*, chap. XXIII.

* *Ante*, secs. 141, 213, 368, and note, 476. *Ante*, sec. 721. See, also, *Richardson v. Baltimore*, 8 Gill (Md.) 433, 1849; *Alexander v. Baltimore*, 5 Ib. 383; *Dudley v. Frankfort*, 12 B. Mon. 610, 615, 1851.

* Mr. High, in his late work, has collected and stated many of the American cases upon the subject of injunctions against municipal corporations. *High on Injunctions*, secs. 783-795. See, also, *Joyce Injunc.* 716.

performed and the public duties discharged.' In England, and possibly, also in this country, the bill may in such cases be filed against the municipal corporation and its officers by the attorney general on his own motion or on behalf of the corporators or persons interested; or the latter may, perhaps, in certain cases, under the line of decisions in this country presently to be mentioned, exhibit the bill in their own names. The jurisdiction of chancery in such cases over municipal corporations is forcibly asserted by the House of Lords, in an interesting and important case in which the corporation of Dublin, under act of parliament, was the trustee of funds raised from water rates, to supply the city with water, and where the bill charging the corporation with breaches of trust and mismanagement, was filed by the attorney general, on behalf of the inhabitants of Dublin paying water rates.¹ Here the public were interested in the proper administration of the authority which had been conferred upon the city corporation in respect to the supply of water to the city, and it is obvious that there was no adequate remedy at law, and hence the propriety of a resort to equity by the rate payers, in the name of the officer authorized to represent the King.²

¹ Attorney General v. Liverpool, 13 Eng. Ch. (1 Mylne & Craig, 171) 343, 359, 1835; Attorney General v. Dublin, 1 Bligh N. R. 312, 1827. *Ante*, secs. 37, 47; chapter on Corporate Property, *ante*, secs. 437-441; chapter on Dedication, *ante*, sec. 515; Baltimore v. Railroad Company, 21 Md. 50, 1863.

It is "a distinctive characteristic of a corporation that it is accountable in equity for *misapplication of trust funds*, whereas, any other body of men, as a parish, can only (where relief can be had at all) be touched through the individuals, or their representatives, who have committed the actual breach of trust." Grant on Corp. 138. Mr. Spence discusses the subject of the equity jurisdiction over corporations as trustees satisfactorily. 2 Spence Eq. Jurisd. 32-35.

² Attorney General v. Dublin, 1 Bligh N. R. 312, 1827. See, also, Attorney General v. Liverpool, 13 Eng. Ch. (1 Mylne & Craig, 171) 343, 1835. The principles on which equity will enjoin the proceedings of *public officers* are stated by Lord *Ottenham*. Frewin v. Lewis, 18 Eng. Ch. (4 Mylne & Craig) 249, 1838. See, also, Baltimore v. Horn, 26 Md. 194, 1866; Holland's Case, 11 Md. 186; Baltimore v. Porter, 18 Md. 284, 1861; Attorney General v. Heelis, 2 Sim. & Stu. 67. Duties and liabilities of public officers. *Ante*, sec. 176, and note.

³ In England it is settled, that in cases such as those mentioned in the

§ 730. So the Court of Chancery, in England, notwithstanding another remedy (which is considered to be cumulative) is given by statute, will relieve against *fraudulent dispositions of corporate property*. And it will also interfere to prevent municipal councils from *abusing powers relating to property and funds* entrusted to them to be exercised in conformity with law for the benefit of the incorporated place or its inhabitants. The just and salutary view is taken, that the powers conferred by the Municipal Corporations Act upon councils in respect to the *corporate funds and corporate property, are public trusts*, and the property owned by the corporations is held by them in trust for the purposes specified or authorized in the act, and hence, if these powers are abused—as, for example, the power of a council to award compensation to officers of the corporation, or if corporate property is collusively alienated—this is a breach of trust of which equity will take cognizance.¹ The uniform and settled practice of pro-

text, or where the corporation is a trustee of property or funds for public uses, it can be made to account to the *crown*, on an information, but not to *private persons* in a suit in equity. Grant on Corp. 138; Skinner's Company v. Irish Society, 12 Cl. & F. 487. See also, 2 Spence Eq. Jurisdic. 32-33.

¹ Attorney-General v. Poole, 4 Mylne & Cr. 17, 80, and overruling 2 Keen, 190, 206; Parr v. Attorney-General, 8 Cl. & F. 409; Attorney-General v. Aspinwall, 2 Mylne & Cr. 613, overruling Master of the Rolls, 1 Keen, 513; Attorney-General v. Wilson, 9 Sim. 30; affirmed by the Lord Chancellor 1 Cr. & Ph. 1; Evan v. Avon (corp. of), 29 Beav. 44.

In explanation of the English decisions referred to in this note, it may be observed that by section 92 of the Municipal Corporations Act of 1835 before mentioned (*Ante*, secs. 8, 26), the income of all the property belonging or payable to any of the old corporations, was to be paid to the treasurer of the new or remodelled corporation, and the fund so created was to be subject to the payment of the debts of the old corporation, to the payment of the salaries of municipal officers, of municipal election expenses, municipal court expenses, and all other expenses incident to carrying the Act into effect; with a provision that any surplus should be applied, under the direction of the council, for the public benefit of the inhabitants and the improvement of the borough. In case the borough fund thus obtained should prove insufficient for the enumerated purposes, power is given to the council to raise the deficiency by taxation or a borough rate.

In the leading case of the Attorney General v. Aspinwall, *supra*, Lord Chancellor Cottenham held that the property in question became, upon the enactment of the Municipal Corporations Act, subject to the public trusts

ceeding in England in such cases, is by information or by bill filed in the Court of Equity by the Attorney General.

declared by that act, and was not under the absolute control of the corporation; and that if any given appropriation of this fund or property be not consistent with the trust, but for purposes foreign to it, the Attorney General has a right to file an information or bill in Equity, asking "that the fund may be recalled, secured and appropriated for the public, or in other words, charitable purposes, to which it is by the act devoted." 2 Mylne & Craig, 618. He says, "I cannot doubt that a clear trust was created by this act *for public, and therefore, in the legal sense of the term, charitable purposes*, of all the money belonging to the corporation at the time of the passing of the act." *Ib.*, p. 623.

On the same principle Lord *Cottenham*, in the case of the Attorney General *v. Poole* (Corp. of), *supra*, held that chancery had jurisdiction on an information of the attorney-general filed on the relation of certain rate-payers of the corporation, *to prevent the municipal council from awarding unauthorized compensation to the officers of the corporation out of the borough fund*, and that it was immaterial that the means of payment were to be raised by a *rate or tax* over the levy of which the court *might* not have any control;—the ground of interference was that the *fund of the corporation, however acquired, is a trust fund*, to be used for, and only for purposes consistent with the provisions of the municipal corporations act, and that trustees may in equity be restrained from committing breaches of trust.

To the objection that "the information did not impute fraud in the proceedings of the council" the lord chancellor said "but a trustee may be guilty of a breach of trust from error or ignorance of his duty, and, if it were necessary to impute fraud, the term itself need not be used; it is sufficient if the facts stated amount to a case of fraud." Conformably to these principles, where the municipal council, *without authority of law, gave a bond to secure compensation out of the corporate funds to an officer of the corporation*, this was held to be a breach of their trust, cognizable in chancery. *Parr v. Attorney General*. 8 Cl. & F. 409.

So in the Attorney General *v. Lichfield* (Corp. of), 13 Simons, 547, 1843, the corporation was enjoined on an information by the attorney general from ordering their treasurer from paying out of the borough fund or any funds of the corporation the amount of a promissory note to one Mallett for £200 borrowed money, and the ground of the order was, in the language of the Vice-Chancellor (Shadwell), that, "taking all the acts of Parliament together, it is quite clear, that the corporation had no authority to give the promissory note to Mallett."

So, also, in Attorney General *v. Norwich* (Corp. of), 16 Simons, 225, 1848, the corporation was restrained, in a suit by the attorney general at the instance of rate-payers, from *using the borough fund for an unauthorized purpose*, viz., to pay the expenses of procuring an act of Parliament to improve the navigation of a river flowing through the corporation. See Attorney General *v. Mayor, &c. of Wigan*, 84 Eng. Ch. 52, 1854. *Frost v. Belmont*, 6 Allen, 152, 1863. *Ante*, sec. 399, n.

The King as *parens patriæ* institutes the suit by his proper officer, the Attorney General, who files the necessary information, or information and bill, as a prerogative right—the right which the sovereign has to call, by his appropriate officers, upon the several courts of justice, according to the nature of their respective jurisdictions, to see that right is done to his subjects, who are incompetent to act for themselves. While it is usual to join relators in the suit, it is not necessary. The object in joining them is that the defendants may not be oppressed, without remedy, by vexatious suits, since the relators are liable to costs, while the Crown is not.¹

§ 730a. In this country the preventing or redressing excesses of municipal power, by a resort to a Court of

In the *Attorney General v. Wilson*, 9 Simons, 80, 1837, affirmed by the Lord Chancellor, 1 Cr. & Ph. 1, 1840, which was an information and bill in equity by the attorney general at the relation of the corporation of Leeds, it was held that chancery had jurisdiction (notwithstanding a special remedy in the municipal corporation act) to relieve against *fraudulent alienations of corporate property*, and that the corporation could impeach the fraudulent acts of its officers, and maintain a suit to set aside transactions fraudulent against it, though carried into effect in the name of members of its council, and this right the lord chancellor considered not to be affected by the circumstance that the attorney general had the like power. A similar power to protect corporate property was asserted by the master of the rolls in the *Attorney General v. Liverpool*, 13 Eng. Ch. (1 Mylne & Cr. 171), 343, 1835, where the information was filed by the attorney general at the relation of two merchants of Liverpool, one of whom was a burgess or rate paying citizen, against the corporation of Liverpool. *Ante*, p. 821, n.

If members of a corporation contrive a scheme to defraud a corporation of its property, they are personally liable. *Attorney General v. Wilson*, *supra*. See, also, *Attorney General v. Litchfield*, 11 Beav. 120; *Attorney General v. Leicester*, 9 Beav. 546; *Attorney General v. Plymouth*, 9 Beav. 67; *Regina v. Liverpool*, 9 A. & E. 435; *Grant on Corp.* 137–139, 142. *Ante*, secs. 175, 176, note.

Whether funds derived by a municipality from taxation for municipal improvements, the payment of municipal expenses, &c., are *charitable funds*: see *Attorney General v. Brown*, 1 Swanst. 265; compare *Attorney General v. Heclis*, 2 Sim. & Stu. 57, both of these cases are referred to in *Attorney General v. Dublin*, 1 Bligh (N. R.) House of Lords Cas. 312, 334. See *Carlton v. Salem*, 103 Mass. 141, 1869, referred to *infra*, sec. 735, note.

¹ Per Lord *Redeadales*, in *The Attorney-General v. Dublin*, Bligh (N. R.) 312, 1827; *Attorney General v. Birmingham*, 8 Law Rep. Eq. 552, 1867; *Attorney General v. Exeter (Corp. of)*, 51 Eng. Ch. 507, 1852; 29 Beav. 44.

Equity, has given rise on some points to much contrariety of judicial opinion. Corporations here derive their powers from express legislative enactment. Most if not all of the States have an officer styled an Attorney General, whose duties are prescribed by statute; but these duties differ in many respects from the duties of this officer at common law. The question has several times arisen how far this officer or the public law officer of the state, may exercise the powers which belong to the office of Attorney General at common law, to file informations or bills in equity, to prevent or redress the illegal acts of municipal officers and corporations; and connected with this inquiry is the further one, when or in what cases private persons in their own names may resort to equity, to prevent the municipal authorities from passing beyond the line of their rightful powers, or to have illegal corporate acts set aside or the injury caused thereby redressed or corrected. How far a Court of Equity may control the acts of municipal and public corporations or their officers, and in what manner or at whose instance it will exercise its jurisdiction where it exists, are questions upon which, as above observed, the courts in this country are by no means fully agreed. It must suffice, in our further treatment of this subject, to notice briefly the adjudications respecting it, and to state what, in the absence of controlling legislative enactments, would appear upon principle and sound public policy to be the correct doctrine, as to the extent and mode of equitable interference with municipal acts, or the exercise of municipal powers.

§ 730*b*. The weight of authority seems to be that the Attorney General of a state, or its other public law officer, has by virtue of his office the right in his name or in the name of the State, upon the relation of persons interested, to bring, in cases which are properly of equitable cognizance, a bill in equity to prevent municipal corporations from exceeding the line of their lawful authority, or to have their illegal acts set aside or corrected.¹ This doctrine has

¹ *Davis v. Mayor, &c. of New York*, 2 Duer (N. Y.) 668. In this case, the subject is very learnedly discussed by Mr. Justice *Duer* who cites and reviews the principal English authorities, and deduces from them the doctrine that when the act of a municipal corporation, which is the subject of

been very recently asserted by an able court, in a case where there was no statute giving the Attorney General power to interfere to prevent an abuse of corporate powers,

complaint, affects injuriously and equally the entire public within the jurisdiction of the corporation, the attorney general is a necessary party.

See, also, *People v. Lowber*, 7 Abb. Pr. Rep. 158, an action by the attorney general to prevent the corporation from completing an alleged illegal contract for the purchase of land on which to erect a market-house. *People v. Mayor, &c.*, 9 *Id.* 253; *People v. Mayor, &c.*, 10 *Id.* 144; *People v. Mayor, &c.*, 32 Barb. 102.

In *Doolittle v. Supervisors of Broome*, 18 N. Y. 157, referred to *infra*, sec. 785, *Denio, J.*, admits that the attorney general may file an information in equity to prevent an act which would be a breach of trust.

The right of the attorney general to bring a suit to prevent the illegal issue of bonds by an incorporated town to a railroad company, was denied by *Mullin, J.*, in the Supreme Court, general term, fifth district, and the previous cases in that state above cited were disapproved; but it is observable that the learned judge seems to reason upon the basis, believed to be fundamentally erroneous, "that the people, that is, the state in its corporate capacity and character, has no manner of interest," in a litigation where the question is whether corporate powers which it has granted have been exceeded or not. *People v. Miner*, 2 Lansing (N. Y.) 896, 1868; re-affirmed, *People v. Railroad Company*, 5 Lansing, 25.

In a recent case in California, it was decided that where a suit is instituted in the name of the state by the attorney general, on the relation of the real party in interest seeking relief, and the state has no interest therein, the attorney general, *as such*, has no power to control the suit or withdraw his consent to the use of the state's name, to the prejudice of the relator. *People v. Railroad Company*, 38 Cal. 564. See *ante*, chap. XX. *as to relator*. *State v. Saline Co.* Court, Sup. Ct. Mo. 1872.

Suit on behalf of all *tax-payers*, when once entertained by the court, cannot be dismissed without an order of court. *McAden v. Jenkins*, 64 North Car. 796, before *Pearson, C. J.*

In Upper Canada, the mayor is the head of the council, and the head and chief executive officer of the corporation, and it is held that a bill will lie in equity by some of the inhabitants of a municipality alleging an illegal misapplication of its funds by the mayor. *Paterson v. Bowes*, 4 Grant, 170. The attorney general is not a necessary party to such suit. *Id.* Where the mayor of a city secretly contracted to purchase at a discount a large number of the debentures of the city, which it was expected would be issued under a contemplated by-law of the city council, and was afterwards himself an active party in procuring and giving effect to the by-law subsequently passed, he was held to be a trustee for the city of the profit derived from the transaction. *The City of Toronto v. Bowes*, 4 Grant, 489, affirmed in Appeal, 6 Grant, 1, and afterwards affirmed by the privy council, *Harris' Munic. Man.* (2d ed.) 86.

or prescribing the terms of such interference, and where the injury complained of by the relators was a disregard of the provisions of a municipal charter, which required contracts to be let to the lowest responsible bidder. It was conceded in that case that the Attorney General would have the right to enjoin the misappropriation of a *charitable fund* held by the corporation; and the court considered that there was *no substantial distinction* between such a case and one where, under legislative authority, a corporation authorized to raise funds by taxation for specified purposes or on certain conditions only, threatens effectually to abuse its powers in this respect by a misappropriation or unwarranted use of corporate moneys or funds.¹

§ 731. In this country, the right of *property holders or taxable inhabitants* to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the tax-payers, such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property, under circumstances presently to be explained, has been affirmed or recognized in numerous cases in many of the states. It is the prevailing doctrine

¹ May, *Attorney General v. Detroit*, 12 Am. Law Reg. (N. S.) 148, not yet officially reported.

"Every misuse of corporate authority is in a legal sense an abuse of trust, and the state, as the visitor and supervisory authority, and creator of the trust, is exercising no impertinent vigilance when it inquires into and seeks to check it." *Ib. per Cooley, J.*, who in his opinion carefully considers what kind and degree of abuse of corporate power will justify the interference of the attorney general. It was held in this case that where the council awarded the contract to the highest of two bidders, for putting down pavements, but the difference in the bids was less than \$200, of which less than \$30 was to be paid by the city, and the contractors had gone on without objection and incurred large expenses, and the lot owners did not complain, that the amount involved was too small to warrant the intervention of the attorney general, especially as it appeared that the error of the council, if any, was not intentional, but one of judgment only.

As to *injunction* for restraining tax or assessment for paving street with patented pavement: *Hobart v. Detroit*, 7 Mich. 246; *Dean v. Charlton*, 28 Wis. 590; *Harlem v. New York*, 83 N. Y. 309. *Ante*, sec. 389.

on this subject. It can, perhaps, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct, and adequate preventive relief against their abuse. It is better that those immediately affected by corporate abuses should be armed with the power to interfere directly in their own names, than to compel them to rely upon the action of a distant State officer. It is advisable briefly to examine the doctrine above mentioned, and the grounds upon which it rests in the light of some of the leading judgments of the courts, in order to see its scope, limitations, and application

§ 732. The Supreme Court of Connecticut, in holding that a *citizen and tax-payer* of an incorporated city *is entitled to an injunction to restrain an illegal appropriation of the money* of the city, says, in substance, that this is so because the city corporation holds its moneys for the corporators, the inhabitants of the city, to be expended for legitimate corporate purposes, and a misappropriation of these funds is an injury to the tax-payer, for which no other remedy is so effectual or appropriate. If the money is taken out of the treasury, one person cannot well sue either the city or the person who receives the money for his proportion, and it is impracticable for all to unite in such a suit.¹ And when the amount thus misappropriated is subsequently needed for legitimate purposes, a citizen cannot resist the necessary tax because the corporation had, at a prior time, misappropriated money.²

¹ *Washington v. Harvard*, 8 Cush. 66, 1851. *Post*, Chap. XXIII. § 751.

² *New London v. Brainard*, 22 Conn. 552, 1853 (appropriating money to celebrate the Fourth of July). Approved. *Harvey v. Indianapolis*, 32 Ind. 244. *Ante*, sec. 100. *Scofield v. Eighth School District* (illegal use of schoolhouse), 27 Conn. 499, 504, applying the same principle to the misappropriation of corporate property; *Webster v. Harwington*, 32 Conn. 131; *Terrett v. Sharon*, 34 Conn. 105.

Though money has been illegally voted by a city or town, and though the petitioners are entitled to resort to equity to restrain illegal appropriations, yet, if they have been guilty of *gross laches*, and have knowingly permitted *third persons* to incur liabilities in good faith, relying upon such appropriation for reimbursement, an *injunction* will be denied. *Tash v. Adams*, 10 Cush. 252, 1852. But parties in whose favor the illegal vote

§ 733. The *same doctrine* has been expressly sanctioned by the Court of Appeals in Maryland, in a case in which it was held that residents and tax-payers of a city might file a bill in equity to restrain the corporation and its officers from taking steps to carry out a city ordinance creating a debt in violation of the constitution.¹ Mr. Chief Justice *Bartol*, in giving the judgment of that tribunal, observed that, "in this state the courts have always maintained, with jealous vigilance, the restraints and limitations imposed by law upon the exercise of power by municipal and other corporations. If the right to maintain such a bill as this be denied, citizens or property holders would be without adequate remedy to prevent the injury which might result to them from the unauthorized or illegal acts of the municipal government or its officers and agents."

§ 734. So, elsewhere, on the ground that the remedy in equity is more direct, speedy, and effectual, than by *certiorari*, it is held that equity will entertain jurisdiction of a bill on behalf of tax-payers *to enjoin the misapplication of the moneys* of the corporation.² Based upon such con-

was made, though they incurred expenditures on the faith of it, are not third persons in the meaning of the principle. *Claffin v. Hopkinton*, 4 Gray, 502; compare, *New London v. Brainard*, *supra*; *Hodges v. Buffalo*, 2 Denio, 110. See Index—*Ultra Vires*.

If an appropriation of money be made for *two objects—one lawful and the other not*, and it cannot be distinguished and separated, the whole will be held void; otherwise the court will enjoin or relieve against the expenditure which is unlawful. *Roberts v. Mayor, &c. of New York*, 5 Abb. Pr. R. 41; *Howes v. Racine*, 21 Wis. 514.

County supervisors cannot, without the aid of legislative authority, pay a debt, though meritorious if it had been legally contracted, which is not legally obligatory upon the county. *People v. Stout*, 23 Barb. 349. See *ante*, secs. 44, 398. *Infra*, sec. 784.

¹ *Baltimore v. Gill*, 31 Md. 375, 395, 1869 (*ante*, sec. 85); approving, *New London v. Brainard*, *supra*, and *Merrill v. Plainfield*, 45 N. H. 126; and disapproving, *Roosevelt v. Draper*, 23 N. Y. 318, and *Doolittle v. Supervisors*, 18 N. Y. 155, mentioned below, sec. 785. See, also, in Maryland, *Frederick v. Groshen*, 20 Md. 436; *Baltimore v. Porter*, 18 Md. 284, 1861. See *Coulson v. Portland*, *Deady*, 481.

² *Colton v. Hanchett*, 13 Ill. 615; *Railroad Co. v. Blanchard*, 54 Ill. 246; 1870; *Wade v. Richmond*, 18 Gratt. (Va.) 583, 1868. *Harvey v. Indianapolis*, 33 Ind. 244; see, also, *Sheaman v. Carr*, 9 Rh. Is. 481, 1867.

siderations, it has been decided that one or more tax-payers, without showing any other injury than that which they will suffer in common with other property holders of the municipality, may file a bill to *restrain the allowance and payment of an illegal claim*, or the collection of a tax for unauthorized objects, such as, for example, to pay a fraudulent or collusive judgment ;¹ or to pay the expenses of a railroad survey which there was no power to make ;² or to refund to individuals money voluntarily contributed by them for the purpose of avoiding a draft in the town.³

§ 735. But, on the other hand, it has been several times decided in New York, that *resident citizens or tax-payers* of a municipal corporation *cannot, as such*, merely, either on their own behalf or on behalf of themselves and all others having a like interest, maintain a suit to restrain or avoid corporate acts alleged to be illegal. The principle applicable to public nuisances is there adopted. Such illegal acts are considered to affect the whole public ; and the public, by its authorized public officers, must institute the proceeding to prevent or redress the illegal act, unless a private person is threatened with or suffers some *peculiar* damage to his individual interest—that is, some damage distinct from that of every other inhabitant, in which case he may maintain his bill for an injunction or for relief in his own name. Private persons may thus protect *their own* interests, but they cannot “assume to be the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts.” Therefore, an illegal alienation of property

¹ Barr v. Deniston, 19 N. H. 170, 180, 1848. See, also, in same state, Merrill v. Plainfield, 45 N. H. 126; *supra*, sec. 732, and note.

² Douglass v. Placerville, 18 Cal. 643.

³ Drake v. Phillips, 40 Ill. 388, 1866. *Ante*, sec. 103; *supra*, sec. 732, and note.

In Iowa citizens and tax-payers may enjoin the expenditure of county moneys by the county officers in the erection of a court house at a place not the county seat of the county, the duty of interfering in such cases not being devolved on any public officer. Rice v. Smith, 9 Iowa, 570, 1859. See Grant v. City of Davenport, Iowa Sup. Court, 1873, not yet reported. Fleming v. Mershon, *Id.* June Term, 1873.

by a corporation, or an illegal act which may or will result in increased taxation, cannot be questioned by a private person, or tax payer, or property owner, unless it be *speciallly* injurious to him.¹

¹ This doctrine, left open in *Ketchum v. Buffalo*, 14 N. Y. 356, 1836, and 13 *Ib.* 143, was first definitely established in New York in the Court of Appeals, in *Doolittle v. Supervisors of Broome County*, 18 N. Y. 155, 1858; disapproving, on this point, of the cases of *Adriance v. Mayor of New York*, 1 Barb. (Supreme Ct.) 19; *Brower v. Same*, 3 *Ib.* 254; *Christopher v. Same*, 13 *Ib.* 567; *Milhan v. Sharp*, 15 *Ib.* 193; *Ib.* 244; and *De Baum v. Mayor, &c.*, 16 *Ib.* 392. So far as these and other prior New York cases hold "that a person owning property fronting on a street is entitled to maintain an action to restrain the commission of an act of nuisance in the street which, from the location of the plaintiff's premises, would render it specially injurious to him, I am of opinion that the law is correctly laid down, as in *Davis v. Mayor*, 14 N. Y. 506." *Per Denio, J.*, 18 N. Y. *supra*, p. 163, and observe street cases reviewed on page 160. (See *ante*, sec. 522.) Doctrine of this case was adhered to and extended to *cities*, in *Roosevelt v. Draper*, 28 N. Y. 818, 1861, which also considers the question when relief may be had by a *creditor*.

Views similar to those held by the Court of Appeals in New York, have received judicial sanction in Massachusetts; and in view of the decisions there made it seems to be unsettled or somewhat difficult to ascertain, except in the cases for which the statute (Gen. Sts. chap. 18 sec. 79) has made provision, in what manner municipal corporations can be made to observe their duties or prevented from violating them to the injury of the inhabitants.

In *Hale v. Cushman*, 6 Met. 425, 1843, which was a bill in equity by sixty-seven legal voters and tax-payers to restrain the officers of a town from paying money under a vote for an alleged unauthorized purpose, the court dismissed the bill on the ground that its equity jurisdiction as conferred by statute did not extend to the case, since "the bill set forth no *trust* in which the complainants have an interest."

The statute above cited (Gen. Sts. chap. 18, sec. 79) was enacted, which provides that "when a town votes to raise by taxation or pledge of its credit, or to pay from its treasury, any money, for a purpose other than those for which it has the *legal* right and power, the supreme judicial court may, upon the suit or petition of not less than ten taxable inhabitants thereof, hear and determine the same in equity." *Frost v. Belmont*, 6 Allen, 152.

In cases not covered by this statute it is considered that the equity jurisdiction of the supreme judicial court does not extend to compelling the performance of a duty by a municipal corporation or its officers upon the relation or suit of individual tax-payers. *Carlton v. Salem*, 103 Mass. 141, 1869; *Attorney General v. Salem*, *Ib.* 188. In these cases the court held that neither by information in the nature of a *quo warranto*, nor on a bill

§ 736. The author may observe that there appears to be little difference of judicial opinion as to the *right of the taxable inhabitants*, wherever the threatened illegal corporate act will increase the burden of taxation, to the aid of equity, in proper cases, to prevent it. The chief difference is as to the *proper party plaintiff* in a bill of this character. If the ordinary principle, which obtains as to public

in equity by the attorney general, nor by a bill in equity by taxable inhabitants, under the statute, could the city of Salem be made to observe the duties enjoined upon it by statute in relation to supplying the city with water. The court seem to treat the wrong as a *private* wrong, but is it such? It denies that there is a *trust* over which a court of equity has jurisdiction; but see *The Attorney General v. Dublin* (*supra*, secs. 729, 730, note), which seems in principle analogous, in which the House of Lords declared there was such a trust as fell within the cognizance of a court of equity. The result in Massachusetts may be influenced by the nature of the equity jurisdiction of the supreme judicial court, though such does not appear to be the case.

The occupant of a tenement in a city entitled under the statute and ordinances of the city corporation to the use of water therein on payment or tender of the rate, may *restrain the city* and its officers *from illegally cutting off the supply of water*. *Young v. Boston*, 104 Mass. 95, 1870.

A statute similar to that in Massachusetts exists in Maine. *Johnson v. Thorndike*, 56 Maine, 32.

The municipal corporation must be a *party*. *Allen v. Turner*, 11 Gray, 426. City collector is a *proper defendant*. *Anderson v. State*, 23 Miss. 459, 1852. *New London v. Brainard*, 22 Conn. 552, 1853.

The New York view is adopted in *Kansas*, where it is held that a suit having for its object the restraining of a county board from allowing a claim alleged to be illegal, and the clerk from drawing a warrant therefor, cannot be maintained by a person having no other interest than one common to all the resident tax-payers of the county. Such a suit, it is further held, cannot be maintained by a private person, unless the act complained of produces some peculiar damage to his individual interests, or affects his rights in a different manner from other members of the community. *Craft v. Jackson County*, 8 Kansas, not yet reported. See, also, as to restraining void tax: *Burnes v. Atchison*, 2 Kansas, 454, 1864; compare, *Leavenworth v. Norton*, 1 *Id.* 432. And it seems to be followed in *Minnesota*. *Conklin v. Commissioners*, 13 Minn. 454. The subject is discussed by Mr. Justice *Campbell*, in *Bagg v. Detroit*, 2 Mich. 330, 346, and in *Chaffee v. Granger*, 6 Mich. 51; *Williams v. Detroit*, 5 Mich. 560. See and compare *Brown v. Manning*, 6 Ohio, 298; *Id.* 102; *Denton v. Jackson*, 2 Johns. Ch. 320; *State v. Commissioners*, 5 Ohio St. 497, 502; *Culbertson v. Cincinnati*, 16 Ohio, 579. A taxable inhabitant has no legal right to *intervene* in a pending suit and defend the action prosecuted against the corporation. *Cornell College v. Iowa County*, 32 Iowa, 520, 1871.

nuisances, is applied, it must be admitted where the duty about to be violated by the corporation or its officers is public in its nature, and affects all of the inhabitants alike, that one, not suffering any special injury, cannot, in his *own name*, or by uniting with others, maintain a bill to enjoin it. And a reason urged against such a course is, that if one citizen may maintain such a bill, an indefinite number of others may each, also, bring separate suits; and an adjudication in one case concludes nothing as to the others, or as to the inhabitants at large. But it is substantially agreed that any taxable inhabitant, or, perhaps, any citizen of the municipality, has such an interest to prevent or to avoid illegal corporate acts that he may be a relator, on whose application the proper public officer of the commonwealth may, on behalf of the public, file the requisite bill in cases which fall within the jurisdiction of equity, to enjoin the menaced illegal act, or, if it has been consummated, to have relief against it. To allow the taxable inhabitant to maintain a bill for an injunction, to prevent illegal expenditures or appropriations of money, has the advantage of directness and simplicity, and, notwithstanding its departure, or apparent departure, from technical principles, has had the quite general, but not uniform, approval of the courts in this country; and practically, this course has not had the effect to engender a multiplicity of similar suits by separate parties, but a few persons usually unite in one suit, which, when judicially settled, in effect settles the question in controversy. There can be no doubt but that the corporation may, in its *own name*, bring suits in proper cases to be relieved against illegal or fraudulent acts on the part of its officers. Since, however, experience has shown how liable these corporations are to be betrayed by those who have the temporary management of their concerns, it would never do for the courts to hold that relief against illegal acts could *only* be had by an authorized suit brought by and in the name of the corporation.

§ 736a. Upon a survey of decisions in Great Britain and the United States, while they discover some diversity of opinion, it seems to us, in view of the nature of municipal powers, the danger of abuse, the necessity for prompt rem-

edy on the part of those most interested in the proper administration of municipal affairs, to wit, the taxable inhabitants, that the following conclusions rest upon reason, and have, perhaps, also, the support of the preponderance of judicial authority.

1. The proper parties may resort to equity, and equity will entertain jurisdiction of their suit against municipal corporations and their officers when these are acting *ultra vires*, or assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such illegal acts affect injuriously the property owner or the taxable inhabitant.¹ But if in these cases the property owners or the taxable inhabitants can have full and adequate remedy at law, equity will not interfere, but leave them to their legal remedy.²

2. That, in the absence of special controlling legislative provision, the proper public officer of the Commonwealth which created the corporation and prescribed and limited its powers, may, in his own name, or in the name of the state on behalf of residents and voters of the municipality, exercise the authority, in proper cases, of filing an information

¹ *Baltimore v. Horn*, 26 Md. 194, 1866; *Baltimore v. Gill*, 31 Md. 375, 395, 1869; *Holland's Case*, 11 Md. 186; *Baltimore v. Porter*, 18 Md. 284, 1861.

The views of the text accord with those of Lord *Cottenham* in *Frewin v. Lewis*, 18 Eng. Ch. (4 Mylne & Craig, 249, 255) 249, 1833. Speaking of the principles on which equity will enjoin public officers and bodies, he says: "So long as those [public] functionaries strictly confine themselves within the exercise of those duties which are confided to them by law this [chancery] court will not interfere . . . to see whether any regulation they make is good or bad; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer treats them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority. While the court avoids interfering with what they do while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; if they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction."

² *Ante*, sec. 727, and cases there cited.

or bill in equity to prevent the misuse of corporate powers, or to set aside or correct illegal corporate acts.

3. That the existence of such a power in the state, or its proper public law officer, is not inconsistent with the right of any taxable inhabitant to bring a bill to prevent the corporate authorities from transcending their lawful powers where the effect will be to impose upon *him* an unlawful tax, or to increase *his* burden of taxation. Much more clearly may this be done when the right of the public officer of the state to interfere is not admitted, or does not exist; and in such case, it would seem that a bill might properly be brought in the name of one or more of the taxable inhabitants for themselves and all others similarly situated, and that the court should then regard it in the nature of a public proceeding to test the validity of the corporate acts sought to be impeached, and deal with and control it accordingly.

§ 737. Respecting the right to *restrain a municipal corporation from collecting taxes*, the courts, in cases where this relief is proper to be granted, have generally held that one or more tax payers may bring a bill for this purpose. There is, however, some want of harmony in the decisions as to what will justify equitable interference, but the correct view doubtless is that equity ought not, except for the clearest reasons, to interfere with the speedy and ordinary collection of municipal or other public revenues.¹ If there is no

¹ The right of tax-payers to unite in a bill and ask for an injunction to restrain the collection of an unauthorized tax was expressly ruled in *Vanover v. Justices, &c.* 27 Geo. 354; 1859, *Lumpkin, J.*, observing: "We approve the remedy resorted to is in this case. It is not only more complete than any other, but the only one, in our judgment, which meets the exigencies of the case." See, also, *Bull v. Read*, 13 Gratt. (Va.) 78; *Nill v. Jenkinson*, 15 Ind. 425; *Lewis v. Henley*, 2 *Id.* 332; *Harward v. Levee Co.*, 51 Ill. 130; *Railroad Company v. Blanchard*, 54 Ill. 240, 1870; *Fleming v. Mershon*, Iowa Sup. Ct. 1873; *Barr v. Deniston*, 19 N. H. 170, 180, 1848; *Frederick v. Augusta*, 5 Geo. 561, 1848; *Baltimore v. Porter*, 18 Md. 284, 1861; *King v. Wilson*, 1 Dillon C. C. 555, 1871; *Coulson v. Portland*, Deady, 481, 1868, where the general subject is well considered. Amount of tax necessary to give federal court jurisdiction. *Id.*

In *Worth v. Fayetteville*, 1 Winst. (N. Car.) Law & Eq. R. No. 2, 70, 1864, C. J. *Pearson*, with great difficulty as to jurisdiction, expressed the

power to levy the tax in question under any circumstances, or if it be assessed upon property not subject to taxation, and the remedy at law is not adequate, a plain case for equitable interposition is made out. But if the power to levy the tax exist, and the property be subject to taxation, mere errors and irregularities should, according to the better considered view, be corrected on *certiorari* or other appropriate proceedings, or their effect left to be tested at law; for *equity* ought not to interfere with the collection of taxes, unless the complainant makes a case coming within some acknowledged head of equity jurisdiction, such as the prevention of a multiplicity of suits, irreparable injury, or where a cloud will be thrown upon his title to real estate. Unless he can make such a case, he must bring a legal action or pursue a legal remedy.¹

opinion that equity might entertain a bill to test the legality of a tax imposed by a municipal corporation, but doubted whether such a bill will lie to enjoin the collection of state and county taxes. The case does not show that the illegal tax was sought to be made by the sale of real estate, or in what manner the tax was about to be enforced. A tax-payer, on behalf of himself and all other tax-payers of the state, may file a bill against the proper state officers and parties to enjoin the issue of state bonds under an unconstitutional statute. *Galloway v. Railroad Company*, 63 North Car. 147, 1869. After the doubt intimated in *Worth v. Fayetteville*, *supra*, the legislature enacted "that a writ of injunction is allowable in all cases against the collection of taxes illegally imposed." *Brodnax v. Groom*, 64 North Car. 244, 1870. In Indiana it is considered that "the assessment of taxes for state purposes is a matter of public concern in which all the citizens of the state are interested, and hence any citizen of the state may be the relator" in proceedings to compel officers of the revenue law to see that its provisions are carried out. *State v. Hamilton*, 5 Ind. 310, 1854, *per Perkins, J.*; *Hamilton v. State*, 3 *Ib.* 452.

¹ *Dows v. Chicago*, 11 Wall. 188, 1870; approving, *Heywood v. Buffalo*, 14 N. Y. 534, 1856; *Bank v. Supervisors*, 25 N. Y. 312; *Cook County v. Railroad Company*, 85 Ill. 465. These cases fully support the doctrine of the text, which is, indeed, extracted from them. See, also, *McLot v. Davenport*, 17 Iowa, 879, 1864, in which the remedies of the tax-payer are fully pointed out by *Cole, J.* *Dodd v. Hartford*, 25 Conn. 232; *Dean v. Todd*, 22 Mo. 91; *Lockwood v. St. Louis*, 24 Mo. 20, 1856; *Hughes v. Kline*, 30 Pa. St. 237; *Livingston v. Wider*, 53 Ill. 302, 1870; *Green v. Mumford*, 5 Rh. Is. 472, 1858, where the rule is strictly held, that to warrant a resort to equity, the remedy at law must be inadequate. See *ante*, sec. 476, and note; sec. 522; sec. 727, 735. In Michigan, see *Merrill v. Humphrey*, 24 Mich. 170.

Mode of collecting taxes and assessments. Ante, sec. 658, *et seq.*

§ 738. Accordingly, equity will not restrain even an illegal and void tax assessment where it is sought to be enforced against *personal property only*, since here the party has an adequate remedy at law: nor in such a case will equity interfere because several join in the bill asking it.¹ Where, however, the effect of the sale will be to cast a cloud upon the title to *real estate*, equity, in many of the states, will, for this reason alone, interfere to prevent it. The Court of Appeals in Maryland, in holding that where a city corporation was seeking to enforce a void tax or assessment by a sale of private property, the owner might enjoin it, speaking through *Le Grand*, C. J., said: "We entertain no doubt on this question. The idea that a party ought to stand by and see his property illegally exposed to public sale, and then force the purchaser to bring ejectment to gain possession or to try his title, seems sustained by no good authority. Such a doctrine would not only encourage circuity of action and multiplicity of suits, but render the title of the real owner comparatively valueless, while the suits at law should be pending. Equity will not allow a title otherwise clear, to be clouded by a claim which cannot be enforced in law or equity."² So in Wisconsin the law is settled that equity will interfere to prevent a cloud upon the plaintiff's title, where his lands are threatened to be sold on

¹ *Dodd v. Hartford* (decided by two judges), 55 Conn. 232, 1856; *Sheldon v. School District*, *Id.* 224. Same point, as to personal property: *Lockwood v. St. Louis*, 24 Mo. 20, 1856; *Leslie v. St. Louis*, 47 Mo. 474, 1871; *Milwaukee Iron Company v. Hubbard*, 29 Wis. 51, 1872; *Chicago, &c., Railroad Company v. Fort Howard*, 21 Wis. 44; *Peck v. Fox Lake*, 28 Wis. 583, 1871; *Coulson v. Portland*, Deady, 481, commenting on *Ewing v. St. Louis*, 5 Wall. 418; *Dows v. Chicago* (tax on bank stock), 11 Wall. 108, 1870. *Ante*, sec. 654, 727, and notes; *Atlantic, &c., Railroad Company v. Clino*, 2 Dillon C. C. 175, 1878. Courts will, indeed, in all cases, cautiously interfere with the exercise of an admitted power. Manifest abuse must be shown. *Sheldon v. School District*, 25 Conn. 224. *Ante*, sec. 58, and notes; sec. 248; sec. 286.

² *Holland v. Baltimore*, 11 Md. 186, 1857; *Baltimore v. Porter*, 18 Md. 284, 1861. *Ante*, sec. 45. In New York, the somewhat stricter view is adopted, that to justify equity in interfering to prevent a cloud being cast upon the title, it must be a proceeding whose invalidity does not appear on its face, but requires extraneous evidence to show it. *Heywood v. Buffalo*, 14 N. Y. 584, 1856; cited with approval, *Ewing v. St. Louis*, 5 Wall. 418, 419, 1866. *Ante*, secs. 476, 727. High on Injunc. secs. 867, 868.

a *void tax or assessment*. But where the defect complained of is merely formal, not impeaching the justice of the tax or assessment, and the plaintiff ought to pay the amount, equity will not interfere, but leave him to his legal remedies.¹

¹ *Mitchell v. Milwaukee*, 18 Wis. 92, 97, 1864, and prior cases in that state there cited. See, also, *Foots v. Milwaukee*, 18 Wis. 270; *Myrick v. La Crosse*, 17 *Ib.* 442; *Bond v. Kenosha*, 17 Wis. 284, 287, where *Cole, J.*, very clearly states the effect of the decisions. *Howes v. Racine*, 21 Wis. 514; *Dean v. Gleason*, 16 Wis. 1, 18; *Barnes v. Beloit* (who may not join in bill), 19 Wis. 93, 1865; *quære*; *Mills v. Charleton*, 29 Wis. 400, 1872; *Ib.* 51.

So in *Iowa*, a bill for an injunction to restrain sale of real estate may be sustained if the proceedings to tax it are clearly illegal. *Litchfield v. Polk County*, 18 Iowa, 70; *Railroad Company v. Mt. Pleasant*, 12 *Ib.* 112.

In *Indiana* it is held that where the owner of real estate in a city stands by and sees a street improved adjoining his property, on a contract made under an order of the common council, without attempting by injunction to prevent such improvement, he cannot, after the work is completed, or nearly completed, refuse to pay for it. *La Fayette v. Fowler*, 84 Ind. 140; Same principle, *Sleeper v. Bullen*, 16 Kansas, 300, 1870. Extension by the city to the contractor of the time to complete the improvement is no ground for an injunction to stay the collection of the assessment. *Ib.* So where an owner of property sees a contractor go on and make a street improvement adjoining his property, under a contract with the city, and makes no objection while the work is being done, he cannot, after the work is completed, and accepted by the city as having been done according to the contract, enjoin the collection of the entire assessments made for such improvement, on the ground that the materials used, and the work done, were not strictly in accordance with the contract; in such case, a complaint for an injunction must show a tender, by the property owner to the contractor, of the value of the improvement. *Evansville v. Pfisterer*, 84 Ind. 36. See, also, as to *effect of delay* in equity, until the improvement is completed: *Weber v. San Francisco*, 1 Cal. 455. *Infra*, sec. 743, note.

In *Michigan* this view of the estoppel of the property owner is taken. In *Motz v. Detroit*, 18 Mich. 495, it was held that petitioners to a city council for public improvements for which the charter makes provision, must be taken to ask that it may be done under the charter, and if it turned out to be invalid, the petitioners were estopped to set up such invalidity as a basis for equitable relief against the action which they had requested. But in *Steckert v. East Saginaw*, 22 Mich. 104, 1870, the above case was distinguished, and such petitioners were held not to be estopped to object that the proceedings upon their petition have been conducted contrary to law, and unless it may be in the case where they had actual knowledge of the illegality of the proceeding before the expenditure was made, they will be in time to object when proceedings are commenced to deprive them of their rights.

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The same view, substantially, is also taken by the Supreme Court of Missouri.¹

In *Kansas* it is decided that courts of equity will not interfere to restrain by injunction the collection of taxes, when the property is subject to taxation, the tax legal, and the valuation not excessive, simply because of irregularities in the assessment. *Amrine v. K. P. R. R. Co.*, 7 *Kansas*, 178, 1871. Must tender what is equitably due. *Morrison v. Hershire*, 32 *Iowa*, 271, 1871. See, also, *Sleeper v. Bullen*, 6 *Kansas*, 800, 1870; *Gulf Railroad Co. v. Morris*, 7 *Kansas*, 210, 1871; *Merrill v. Humphrey*, 24 *Mich.* 170.

In *Massachusetts*, both with respect to general taxes, and local assessments illegally levied upon land, it is held that equity will not restrain a city corporation from selling the land therefor, and the ground upon which the court bases the doctrine is that if the land owner should pay the tax or assessment to save his land from a sale under the form of legal process he would be entitled to recover it back as money wrongfully received by the corporation, and hence he has, in the view of the court, a complete and adequate remedy at law. *Loud v. Charlestown*, 99 *Mass.* 208; *Arnold v. Cambridge*, 106 *Mass.* 352, 1871; *Whiting v. Boston*, 106 *Mass.* 80, 1870; *Hunnewell v. Boston*, *Id.* 350, and cases there cited.

The act of the *Illinois* legislature of April 16, 1869, by which taxes to pay railroad aid bonds registered in the office of the auditor of public accounts, are to be levied and collected by certain state officers instead of local or municipal officers, does not infringe the constitution of the state; but if bonds are unlawfully registered the courts will enjoin proceedings to collect taxes to pay them. *Dunnovan v. Green*, 57 *Ill.* 30.

For a very full collection of the cases upon the subject of *injunctions against taxes*, see High on Injunctions, chap. VII.

¹ *Leslie v. St. Louis*, 47 *Mo.* 474, 479, 1871. In this case a bill was filed for an injunction to restrain the city from selling the complainant's real estate for an assessment for benefits. The assessment was held void because no effort had been made by the city to agree with the owner (*ante*, sec. 470). Treating of the question whether there is a remedy in equity, *Wagner, J.*, says: "Courts of equity never allow relief by injunction to prevent the sale of personal property, but where real property is about to be sold by a municipal corporation for the payment of [illegal] taxes or assessments, equity will interpose. The distinction lies in the fact that in the one case a full and complete remedy is furnished at law, while in the other a cloud is about to be cast over a land title and the court interferes to prevent it. *Lockwood v. St. Louis*, 24 *Mo.* 20; *Fowler v. St. Joseph*, 37 *Mo.* 228." But the same court in *Anderson v. St. Louis*, 47 *Mo.* 479, 1871, held that equity would not enjoin the city from taking possession of the plaintiff's real estate under a void condemnation, where it did not appear that by trespass, ejectment, or *certiorari*, there was a complete remedy at law; and the case of *Ewing v. St. Louis*, 5 *Wall.* 413 (*ante*, sec. 476) was approved.

Remedy by Certiorari.

§ 739. It is well settled in England that courts of superior and general jurisdiction will examine on *certiorari* the proceedings of inferior or special jurisdictions or officers. Thus, *certiorari* lies to the censors of the college of physicians,¹ to commissioners of sewers,² and to justices of the peace.³ Such a superintending power to restrain and correct the irregularities and mistakes of inferior officers and jurisdictions is both necessary and salutary. If the proceedings are in a common law court of record, a writ of error is the proper remedy to correct or vacate them if erroneous; otherwise, the remedy is by *certiorari*.⁴ So, in *this country*, the rule has been very generally adopted by the courts, where a new jurisdiction is created by statute, and the inferior court, board, tribunal, or officer exercising it, proceeds in a summary manner, or in a course different from the common law, that the circuit or district court of the state, or other tribunal exercising general original common law jurisdiction, has, in the absence of a specific remedy being given, an inherent authority to revise the proceedings of such inferior jurisdiction by *certiorari*; and in such cases a writ of error is not, without the aid of statute, the proper remedy to effect the removal of the proceedings to the revisory tribunal.⁵

¹ *Groenvelt v. Burwell*, 1 Ld. Raym. 454, 469, and cases there cited; 1 Salk. 144.

² *Ib.*

³ *Rex v. Inhabitants (Caerdiffe Bridge Case)*, 1 Ld. Raym. 580.

⁴ *Parks v. Boston*, 8 Pick. 213, 226, 1829; *Lawson v. Commissioners &c.*, 2 Caines, 182; *Wood v. Peake*, 8 Johns. 54; *Wildy v. Washburn*, 16 Johns. 49.

⁵ *Ante*, secs. 368, 476; *Intendant, &c. v. Chandler*, 6 Ala. 899, 1844; *Ex parte Tarlton*, 2 Ala. 35, 1841. In *Matter of Negus*, 10 Wend. 34, 39, 1832; *Ruhlman v. Commonwealth*, 5 Binn. 26, 1812; *Savage v. Gulliver*, 4 Mass. 178; *Commonwealth v. Ellis*, 11 *Ib.* 465; *Edgar v. Dodge*, *Ib.* 670; *Ball v. Brigham*, 5 Mass. 406; *Bob (a slave) v. State*, 2 Yerg. (Tenn.) 173, 1826; *Lawson v. Scott*, 1 *Ib.* 92; *Wildy v. Washburn*, 16 Johns. 49; *Street v. Francis*, 3 Ohio, 277; *State v. Bill*, 13 Ire. Law (North Car.) 373, 1852; *Redfield on Railw.* chap. XXVI. When remedy is by *certiorari*, and when by bill in equity, and when not, in Massachusetts, see *Whiting v. Boston*, 106 Mass. 89, 1870; *Jones v. Boston*, 104 Mass. 461. *Ante*, sec 738, note.

§ 740. The unquestionable weight of authority in this country is, if an appeal be not given, or some specific mode of review provided, that the superior common law courts will, on *certiorari*, *examine the proceedings of municipal corporations*, even although there be no statute giving this remedy; and if it be found that they have exceeded their chartered powers, or have not pursued those powers, or have not conformed to the requirements of the charter or law under which they have undertaken to act, such proceedings will be reversed or annulled. An aggrieved party is, in such case, entitled to a *certiorari ex debito justitiæ*.¹

Thus, if no appeal or other mode of review be given, and if there be no statute to the contrary, the legality of convictions in *municipal courts* will be revised on *certiorari*.² So, under the same circumstances, and in the same way, the proceedings of municipal corporations in *opening streets*,³ in making *local assessments*, or *levying*

¹ *State v. Bill*, 13 Ire. (North Car.) Law, 373, 1852; *Intendant v. Chandler*, 6 Ala. 899, 1844; *Carroll v. Mayor, &c.*, 12 Ala. 173; *Jackson v. People*, 10 Mich. 111, 1860, cited *ante*, sec. 368, note; *State v. Stewart*, 5 Strob. (South Car.) Law, 29; *State v. Swift*, 1 Hill (South Car.) 860; *Dwight v. Springfield*, 4 Gray, 107, 1855; *Parks v. Boston*, 8 Pick. 218, 1829; *Fay, Petitioner*, 15 Pick. 243, 1834; *Cunningham v. Squires*, 2 West Va. 422, 1868; *Taylor v. Americus*, 39 Ga. 59, 1869; *Mayor v. Shaw*, 16 Ga. 172, 1854; *Shaw v. Mayor*, 19 Ga. 468; *Burns v. La Grange*, 17 Texas, 415, 1856; *Buckner, Ex parte*, 4 Eng. (Ark.) 73, 148; *Camden v. Mulford*, 2 Dutch. (N. J.) 49; *Carron v. Martin*, *Id.* 594, 1857; *Morris Canal Company v. Jersey City*, 1 Beasley (N. J.) 252; *Holmes v. Jersey City*, *Id.* 299; *State v. Newark*, 1 Dutch. 399, 1856; *State v. Hudson*, 32 N. J. 365; *Swan v. Cumberland*, 8 Gill (Md.) 150, 1849; *Dorchester v. Wentworth*, 11 Fost. (N. H.) 451; *Railroad Company v. Whipple*, 22 Ill. 105; *Ewing v. St. Louis*, 5 Wall. 413, 1866. *Ante*, secs. 368, 476, 643; *Tierney v. Dodge*, 9 Minn. 166; *State v. Dowling*, 50 Mo. 134, 1872; *St. Paul v. Marvin*, 16 Minn. 103, 1870. *Ante*, sec. 423, n.

² *Taylor v. Americus*, 39 Ga. 59, 1869; *Intendant v. Chandler*, 6 Ala. 899, 1844; *Jackson v. People*, 10 Mich. 111, 1860. *Ante*, sec. 368, and note, and remarks of Mr. Justice Campbell.

³ *Ex parte Tarlton*, 2 Ala. 35; *Dwight v. Springfield*, 4 Gray, 107; *Carron v. Martin*, 2 Dutch. (N. J.) 594, 1857; *Dorchester v. Wentworth*, 11 Fost. (N. H.) 451; *Parks v. Boston*, 8 Pick. 218, 225; *Ewing v. St. Louis*, 5 Wall. 413, 1866, cited *ante*, sec. 476, note; *St. Charles v. Rogers*, 49 Mo. 530, 1872.

It seems to be the settled view in New York, that without a statutory enlargement of the functions of the writ of *certiorari*, it will be denied, or

taxes,¹ in contested *election cases*,² and the like, will be examined and reviewed, to ascertain whether they are legal and regular, and if not so, they will be quashed.

if granted, it will be quashed when it is sought for the purpose of reviewing the official or *corporate* proceedings of a common council when they are of a legislative, executive, or ministerial character; as, for example, the regularity of proceedings by ordinances or resolutions under the right of eminent domain to open streets, squares, &c., and for constructing sewers in streets, and the like improvements, including assessments therefor; and the regularity of proceedings voting taxes, appointing officers, making by-laws, &c., &c. *People v. Mayor, &c.*, 2 Hill (N. Y.) 9, 1841. In *Matter of Mount Morris Square, Id.* 14, questioning *Parks v. Boston, supra*, which holds that proceedings to open streets may be reviewed on *certiorari*, and also, doubting *Le Roy v. Mayor, &c.*, 20 Johns. 420, and *Baldwin v. Calkins*, 10 Wend. 166, so far as the latter asserts that the *principle of assessment* may be reviewed by *certiorari*. It is admitted, however (2 Hill, 24), that the writ will lie to the local courts or corporate officers exercising judicial functions. See, further, as to remedy by *certiorari*: *People v. Supervisors*, 15 Wend. 198; *Same v. Same*, 1 Hill, 195; 23 Wend. 277; *Stone v. Mayor*, 25 Wend. 157, 167, *per Paige*, Senator; *Id.* 693. The doctrine of the New York cases denying that the proceedings of municipal corporations in opening streets, making assessments, &c., can be reviewed on *certiorari*, followed in *Dixon v. Cincinnati*, 14 Ohio, 240, 1846, but the weight of authority is otherwise. See chapter on Eminent Domain, *ante*, sec. 476.

The later New York cases have settled the law in that state to the effect that upon a common law *certiorari* "the duty of the court is not limited to the inquiry whether the lower tribunal had jurisdiction over the parties and the subject matter, but it is the duty of the court, in addition thereto, to examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated." *Per Grover, J.*, *People v. Smith*, 45 N. Y. 772, 1871. See previous cases cited and reviewed by *Woodruff, J.*, *People v. Police Board*, 89 N. Y. 506, 1868.

¹ *State v. Newark*, 1 Dutch. (N. J.) 399, 1856; *Swann v. Cumberland*, 8 Gill (Md.) 150, 1849; *Buckner, Ex parte*, 4 Eng. (Ark.) 73, 1848; *Carroll v. Mayor, &c.*, 12 Ala. 173; *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444, 1872, where the authorities are very fully considered by *Cole, J.* See, also, *People v. Ogdensburg*, 48 N. Y. 390, 1872, holding that the action of the assessors in putting upon and refusing to strike from the roll non-taxable property can be reviewed on *certiorari*. *Ante*, sec. 643, and note 4.

Certiorari lies at common law to remove a tax assessment, but as the allowance of the writ is discretionary, it is generally refused on grounds of public policy and convenience. *Per Beardsley, J.*, *Weaver v. Devendorf*, 3 Denio, 117-119; 15 Wend. 198; 1 Hill (N. Y.) 195; 2 Hill, 9, 11; *Id.* 14-

² *Cunningham v. Squires*, 2 West Va. 422, 1868. Further, as to power

§ 741. At common law *certiorari* only lies to inferior courts and officers exercising *judicial* powers ; not only so, but the act to be reviewed must be *judicial* in its nature, and not merely ministerial.¹ But the doctrine that *certiorari* lies only to examine the validity of such ordinances and acts of a municipal corporation as are of a *judicial* character, and not such as are legislative or ministerial in their nature, is not adopted in New Jersey, but in that State this writ has long been used to test the validity of the acts and ordinances of such corporations, whatever their nature, whether legislative, ministerial, or judicial, and is considered ordinarily to be the appropriate remedy ; but equity will also, in proper cases, entertain jurisdiction.² And in other states the powers with which the municipal authorities are clothed, to be exercised whenever in their opinion the convenience or welfare of the inhabitants requires it, are considered to be *judicial*, and hence *certiorari* lies to remove proceedings thereunder to the proper court for examination ; but if the local authorities have decided that the public convenience or welfare requires the exercise of

21. But it ought, we think, to be freely allowed whenever necessary to protect the citizen in his legal rights. Effect of not resorting to *certiorari* on the right to an injunction against assessments for local improvements. *Ottawa v. Railroad Company*, 25 Ill. 48, 1860; *Ewing v. St. Louis*, 5 Wall. 418. *Ante*, sec. 423, n.

to review on *certiorari* the regularity of the proceedings of inferior tribunals in cases of *contested elections* : *Gibbons v. Sheppard*, 65 Pa. St. 20, 1870; S. C., *Brightley's Election Cases*, 538. *Ante*, chap. IX. on Municipal Elections, also, secs. 368, 715.

¹ Bacon's Abr. *Certiorari*, B ; *People, &c. v. Mayor, &c. of New York*, 2 Hill (N. Y.) 9; 11 *Id.* 21, 1841. Street and assessment cases. *People v. Covert*, 1 Hill, 674. In *Fouda v. Canal Appraisers*, 1 Wend. 288, a *certiorari* was granted where the damages of a party were appraised without notice, and without giving him an opportunity to be heard or to produce testimony.

² *Camden v. Mulford*, 2 Dutch. (N. J.) 49, 1856; *Carron v. Martin*, *Id.* 594, 1857; *Morris Canal Company v. Jersey City*, 1 Beasley (N. J.) 252; *Holmes v. Jersey City*, *Id.* 299. Further, as to office of the writ. *State v. Hudson*, 32 N. J. 865; *State v. Donahay*, 1 Vroom, 404; *Jersey City v. State*, *Id.* 521; *State v. Water Commissioners*, *Id.* 247. *Supra*, sec. 727, and note. What acts are judicial, and what ministerial, in their nature. *Camden v. Mulford*, *supra*.

the power, as, for example, the establishment or improvement of a street, the decision of such a question cannot be judicially revised on *certiorari*.¹ This is so for the reason that questions of this character are not judicially reviewable,² and for the further reason that *certiorari*, unless otherwise provided by statute, only lies to correct errors of law in inferior jurisdictions. Where an appeal is allowed, it, in general, takes up the cause or proceeding for determination *de novo*, unless otherwise ordered by statute; but *certiorari* is not a substitute for an appeal, and is not designed to correct errors of fact.³

§ 742. Although there is some contrariety of opinion as to just what the writ removes, and as to whether the evidence, if certified, can be considered at all, the more liberal and better view is, that the revisory court may not only *inquire into the jurisdiction of the inferior tribunal, but into errors of law* occurring in the course of the proceedings and affecting the merits of the case, and may also examine the *evidence* embodied in the return, “not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the superior tribunal.”⁴

¹ *Dwight v. Springfield*, 4 Gray, 107, 1855; *Parks v. Boston*, 8 Pick. 218, 1829; *Stone v. Boston*, 2 Met. (Mass.) 220; *Fay, Petitioner*, 15 Pick. 248, 1834; *Monterey v. Commissioners*, 7 Cush. 394, 1851. *Ante*, sec. 58. In Georgia, *certiorari* was held to lie to a city council that accused, tried, and dismissed a city officer for alleged official neglect, the constitution providing that the superior courts “shall have power to correct errors in inferior judicatories, by a writ of *certiorari*,” the council, in trying and dismissing their officer, being regarded as a judicatory. *Mayor, &c. v. Shaw*, 16 Ga. 172, 1854. See *Shaw v. Mayor, &c.*, 19 *Id.* 468.

² *Ante*, secs. 58, 728.

³ *State v. Bill*, 13 Ire. (North Car.) Law, 373; *State v. Stewart*, 5 Strob. (South Car.) 29; *State v. Swift*, 1 Hill (South Car.) 360; *State v. Cockrell*, 2 Rich. (South Car.) 8. *Post*, sec. 742.

⁴ *Jackson v. People*, 10 Mich. 111, 1860, where the subject is fully and ably examined by Mr. Justice Campbell, and the propositions of the text fortified by the authorities cited. In Massachusetts it is held, that the Superior Court, on *certiorari*, can only examine into the regularity and legality

§ 743. From inferior jurisdictions an appeal or writ of error exists only as it is provided by law, but where a remedy by writ of error or by appeal is given, a *common law certiorari cannot be sustained*.¹ But if an appeal where it exists is improperly denied, or if the party is deprived of it by fraud or accident, he may have his whole case reviewed by *certiorari*, both as to matters of law and fact; and where the right of appeal is not allowed, or does not exist, the aggrieved party is still entitled to have his case revised by a superior tribunal.²

of the proceedings; that is, whether the inferior jurisdiction has pursued the powers granted, and conformed to the requirements of the law under which it professes to act. *Ante*, sec. 368, note; *Parks v. Boston*, 8 Pick. 218; *Dwight v. Springfield*, 4 Gray, 107; *Fay, Petitioner*, 15 Pick. 243. In New York a stricter view seems to prevail, and it is held that the supervisory court is confined, if its powers are not enlarged by the statute, to an examination "to see whether the limited (or subordinate) jurisdiction have exceeded their bounds," kept within the limits of the jurisdiction. The case cannot be re-tried upon the evidence or its merits. The record alone, or that which stands for it, is regarded. *People, &c. v. Mayor, &c. of New York*, 2 Hill, 9, 1841. In *Matter of Mount Morris Square*, 2 Hill, 14; 1 Hill, 674; *Stone v. Mayor, &c.*, 25 Wend. 157, 167, and authorities cited by *Paige*, Senator; *People v. Rochester*, 21 Barb. 656; S. P., 2 Hill, 27, and cases there cited; *Rex v. Morely*, 2 Burr. 1040, 1042; 25 Wend. 168, and authorities there cited; *Ex parte Mayor, &c.*, 28 Wend. 277, and cases cited and commented on by *Coven, J.*, 6 Wend. 565. A more liberal view obtains in Wisconsin. *Milw. Iron Co. v. Schubel*, 29 Wis. 444, 1872.

¹ *Duggen v. McGruder*, Walk. (Miss.) 112; *Rundel v. Baltimore*, 28 Md. 356, 1867; *Storm v. Odell*, 2 Wend. 287; *State v. Wakely*, 2 Nott & McC. 410; In *matter of Mount Morris Square*, 2 Hill (N. Y.) 14, 27, and the many authorities cited by *Coven, J.*; and it was there held that the right of opposing in the Supreme Court the report of the commissioners of estimate and assessment in proceedings to open and widen streets, was in the nature of a remedy by appeal, and therefore *certiorari* would not lie to review their proceedings. See, also, *People v. Covert*, 1 Hill, 674. *Ante*, sec. 139; sec. 368; sec. 476. So, *delay* may defeat right to a *certiorari*. *Elmendorf v. Mayor, &c.*, 25 Wend. 693, adopting analogy of statute relative to writs of error. *Supra*, sec. 643, note; sec. 738, note. *Writ, how directed*. *Bogart v. Mayor, &c.*, 7 Cow. 158. *Practice under writ*. *Mayor v. Shaw*, 14 Geo. 162.

² *State v. Bill*, 18 Ire. (Law) North Car. 373, 1852. As to right and manner of appeals by municipal corporations, see, generally, chapter on Municipal Courts, *ante*, secs. 361, 367, 368; also, *Pottsville v. Curry*, 32 Pa. St. 443; *Robinson v. County*, 6 Watts & S. 16; *Monaghan v. Philadelphia*, 4 Casey, 207. Supersedes necessary to stay proceedings to open street. *Dussau v. Municipality*, 6 La. An. 575.

Remedy by Prohibition.

§ 744. In some of the states the *writ of prohibition* is resorted to to prevent municipal corporations from transcending the bonds of their jurisdiction or exercising powers not conferred.' A manifest difference between the writ of prohibition and the writ of injunction is this: the former operates upon the *court*, and the judge or officer who disregards it may be punished; the latter operates upon the *party* alone, but does not interfere with the court itself.' Where prohibition is a proper remedy, the writ will not be granted unless the party is in danger of being injured by a suit *actually depending*; it will not be granted because such a suit is threatened.'

' *Mayo v. James*, 12 Gratt. (Va.) 17; *Warwick v. Mayo*, 15 *Id.* 528; *Clayton v. Heidelberg*, 9 Sm. & Marsh. 623. In *Arkansas* the writ does not lie where the inferior court has jurisdiction of the subject matter on a suggestion of erroneous proceedings. *Blackburn, ex parte*, 5 Ark. 21. The reports of judicial decisions in *South Carolina* show that it is the constant practice in that state to restrain, by *prohibition*, not only inferior judicial tribunals, but also municipal corporations and corporations *sub modo* from the exercise of unwarranted powers, or the imposition of penalties beyond their jurisdiction. *State v. Commissioners of Roads*, 1 Const. R. 55, 1817, where the subject is fully examined; *McKee v. Town Council*, Rice Law, 24, 1838; *City Council v. Pinckney*, 1 Const. R. 42, 1813; S. C., 3 Brev. 217; *Zylstra v. Charleston*, 1 Bay, 382. If an appeal is given, that course is the proper one for the aggrieved party to pursue if he wishes a trial *de novo*, and, in general, he is entitled to a *certiorari*, if he has no other remedy, in order to review errors of law committed by the inferior jurisdiction. *State v. Wakely*, 2 Nott & McCord (South Car.) 410, 1820; *State v. Cockrell*, 2 Rich. (South Car.) Law, 6, *per Evans, J.*; *McDonald v. Elfe*, 1 Nott & McC. 501.

' *Mealing v. Augusta, Dudley* (Geo.) 221, 1833. Where a city council is not a *court*, but is exercising the powers given to it as the governing body of the corporation, it is not such a tribunal as can, in the opinion of the Superior Court of Georgia, be reached by prohibition. *Mealing v. Augusta, Dudley*, 221.

' *Mealing v. Augusta, Dudley* (Geo.) 221, 1833.

' Respecting the nature of the *writ of prohibition and the practice under it*. *Mayo v. James*, 12 Gratt. (Va.) 17; *Ellison, ex parte*, 20 Gratt. (Va.) 10, 1870, where a writ of prohibition is distinguished from a writ of error; *Superv. v. Gorrell*, 20 Gratt. (Va.) 484; 3 Black. Com. 112; 8 Bac. Abr. 206, title *Prohibition*; 7 Com. Dig. 185, same title; *Home v. Earl Camden*, 2 H. Bl. 533; *Gould v. Gapper*, 5 East, 345; 1 Saund. 136, and notes; *Et*

Remedy by Indictment.

§ 745. It is a clear principle of the *English law*, that all corporations, municipal as well as private, which owe duties to the public, are liable to indictment for malfeasance as well as nonfeasance in respect to such duties. The duty, however, must be one which is devolved on the corporation by prescription or by statute—it must be a duty or obligation of a public nature, and one, it is supposed by the author, mandatory in its nature, and not discretionary. This method of redress on the part of the public against municipal corporations is most frequently resorted to for their failure to maintain and repair bridges or highways in compliance with a prescriptive duty or statutory command; but the principle is general in its character within the limits above indicated.¹

§ 746. In *this country* the same principles have been recognized, and corporations are generally regarded as indictable for misfeasance, as well as nonfeasance, respecting

parte Williams, 4 Pike (Ark.) 537, and note, giving *forms* used in the proceeding; *Arnold v. Shields*, 5 Dana (Ky.) 18; *Clayton v. Heidelberg*, 9 Sm. & Marsh. 623, 1848, where the office of the writ is discussed.

¹ *Mayor, &c. of Lyme v. Henley*, 3 B. & Ad. 77; S. C., 2 Clark & Fin. 831; *Call Sewers*, 116, 117; *Regina v. Railway Company*, 9 Q. B. 315; 9 Ad. & Ell. (N. S.) 314; *Rex v. Mayor, &c.*, 14 East, 348; *Grant Corp.* 283; *Rex v. Railroad Company*, 9 Car. & P. 469; *Rex v. Oxfordshire*, 16 East, 223; 1 Kyd, 225, 226; 6 Maule & Selw. 865, note. *Ante*, sec. 176, note; sec. 505, and notes. See *Regina v. Nott*, 4 Q. B. 773. Other mode of enforcing *such* duties, see chapter on *Mandamus, ante*.

Appearance is enforced by distress. *Regina v. Railway Company*, 8 Ad. & Ell. (N. S.) 228. And, upon conviction, the corporation may be fined. *Id.* Upon an indictment against a town for not making or repairing a highway, the town cannot object that the record of the laying out of the road shows that one of the *land owners*, over whose land the road was laid, *was not notified*. Such an objection should be made before the road was finally established. *State v. Raymond*, 7 Fost. (N. H.) 889, 1853. *Notice: Ante*, sec. 471.

Twenty years acquiescence, on the part of a town, in the doings of their selectmen in the laying out of a highway and the making of repairs during that period, estop the town when indicated from claiming that the road was legally laid out. *State v. Boscawen*, 32 N. H. 331, 1855. See *ante*, chapter on Dedication, secs. 500, 505.

duties of a public nature, plainly enjoined by the legislature for the benefit of the public. The modern view is to assimilate corporations as to their duties and responsibilities, so far as possible, to individuals. It is admitted that they cannot be indicted for felonies, but it is clear that they may be for acts done to the injury and annoyance of the public, and which amount to a nuisance.¹

§ 747. In Tennessee a municipal corporation is considered liable, upon the general principles of the common law, to indictment for *neglecting its duty to keep its streets in reasonable repair*, and it is no defence that the street is little used, and is in a remote part of the town.² And the mayor and aldermen may also be personally indicted for like neglect of duty.³ So in the same state it is held, upon the general principles of the law, that if a municipal cor-

¹ Commonwealth v. Proprietors of Bridge, 2 Gray, 339, and cases cited; Commonwealth v. Railroad Corporation, 4 Gray, 22, 1855; Freeholders, &c. v. Strader, 3 Harr. (N. J.) 108; State v. Railroad Company, 3 Zab. (N. J.) 860; State v. Hudson County, 1 Vroom (N. J.) 137, 1862, cited *infra*; State v. Railroad Company, 27 Vt. 103; Phillips v. Commonwealth, 44 Pa. St. 197; Redfield on Railways, chap. XXIX. It is held in Massachusetts that a railroad constructed over a public highway in such a manner as to obstruct the public travel is liable to indictment, this being the proper redress for the public. Commonwealth v. Railroad Corporation, 2 Gray, 54, 1854; Cambridge v. Railroad Company, 7 Met. 70. See Railroad Company v. State, 3 Head (Tenn.) 523.

² Chattanooga v. State, 5 Sneed (Tenn.) 578, 1858; State v. Barksdale, 5 Humph. (Tenn.) 154; State v. Mayor, 11 Ib. 217, where form of indictment is given. *Post*, chap. XXIII. as to repairs of streets.

³ Hill v. State, 4 Sneed (Tenn.) 443, 1857.

And in *Pennsylvania* an indictment lies as at common law against public officers for neglect of public duties; and the principle was extended to a contractor for the repair of roads: Phillips v. Commonwealth, 44 Pa. St. 197.

Authorities relating to indictments against *public officers*, see chapter on Corporate Officers, *ante*, chap. IX., sec. 176, note. The Supreme Court of Illinois has recently (May, 1878), decided that an alderman was indictable as at common law for a proposal made by himself to receive a bribe to influence his official action. Walsh v. People, 5 Chicago Legal News, 541.

Requisites of indictment against official or corporate body for non-repair of streets. State v. Commissioners of Halifax, 2 Dev. 345. *Ante*, chap. IX. sec. 176, note. Facts which will sustain an indictment. Davis v. Bangor 42 Maine, 522; Howard v. Bridgewater, 16 Pick. 189.

poration has power by its charter to pass such ordinances as may be necessary "*to preserve the health* of the town, and to prevent and remove nuisances," it is its positive duty to exercise this power, and that for a *neglect of this public duty* it or its officers are liable to an indictment. An indictment against the mayor and aldermen was accordingly sustained for *permitting a slaughter house* to be kept upon the private property of a citizen of the town to the annoyance of the inhabitants and the exposure of the public health, the court remarking that "An indictment against the corporation is the proper mode of redress by the public for a grievance of this nature."¹

So, also, in Kentucky a municipal corporation is indictable as at common law for *suffering its streets* to become and remain out of repair.²

In Vermont a town is liable to an indictment as at common law for not *erecting a bridge* pursuant to an order from a competent tribunal.³

In Maine, towns charged with the maintenance of *public highways* are by *statute* indictable for failing to discharge their duty in this respect; and the general principle is asserted in such cases, that where the town is civilly liable in damages it may be indicted.⁴

¹ *State v. Shelbyville*, 4 Sneed (Tenn.) 176, 1856; *Hill v. State*, *Id.* 443.

But in Vermont it has been held that a town is not indictable for not removing nuisances; as, for example, a stagnant and noxious pool of water beside a street, not created by it or its agents. *State v. Burlington*, 36 Vt. 621, 1864. Whether a municipal corporation is liable to indictment for keeping and maintaining a "*calaboose*," if it is so situated or managed as to become a nuisance, *quære*. *Paris v. People*, 27 Ill. 74.

² *Commonwealth v. Hopkinsville*, 7 B. Mon. (Ky.) 38, 1846; *Hamar v. Covington*, 8 Met. (Ky.) 494, 1861, *per Peters, J.*

³ *State v. Whittingham*, 7 Vt. 390, 1835.

⁴ *Per Weston, C. J.*, *State v. Great Works Milling Company*, 20 Maine, 41, 1841; *Davis v. Bangor*, 43 Maine, 522, 1856; *State v. Gorham*, 37 Maine, 451, 1854, where a town was held indictable for neglecting to keep in repairs a bridge and abutments erected by a *railroad company* over a railroad where it crosses the public highway. The *primary* liability under the statute, as respects the public, was considered as resting upon the town rather than upon the railroad company; the latter, however, would be liable to the town, which could enforce such liability by *mandamus* to compel the railroad companies to keep such bridges as the law requires them to maintain, in repair. See *Cambridge v. Charlestown Railroad Company*, 7 Met. 70;

§ 748. On the ground that the legislation, both colonial and state, had imposed the duty of *repairing bridges* on the township, and had never recognized the common law principle of holding the inhabitants of counties responsible for repairs, the Supreme Court of New Jersey holds that the *inhabitants of counties* in that state are not indictable for not repairing bridges over rivers; nor at common law were they so indictable for not repairing bridges over canals. The court enters a *caveat* against "acquiescing in the *dicta* in the books," asserting a doctrine which would make the inhabitants of townships or the board of freeholders indictable for the non-repair of bridges.¹ Under a statute investing the county commissioners "with a general superintendence over the public roads," prescribing their duties and the manner of raising means, and also providing for the indictment of the commissioners for "palpable omission of duty," no prosecution can, in the opinion of the Supreme Court of Illinois, be sustained, unless there was a palpable omission of a duty imperatively required by law, in a matter involving no discretion, or a willful and corrupt, as well as palpable, neglect of a discretionary duty, mere error of judgment or departure from sound policy not being sufficient where the defendants are vested with a discretionary power.¹

Rex v. Birmingham, &c., Railroad Company, 9 Car. & P. 469. *Or by indictment*: *Rex v. Inhabitants of Oxfordshire*, 16 East, 223. Or, if money be expended by the town in necessary repairs, by *an action on the case*. Further, as to liability of towns for defects in railroad bridges erected on a public highway, see *Sawyer v. Northfield*, 7 Cush. 490, where, under the statute of Massachusetts, a different conclusion was reached. Under the statute of the latter state, the liability of the town is qualified, and does not exist where the turnpike, or bridge, or railroad company, is bound, by law or charter, to keep the roads and bridges built by them in repair, in which case they, and not the towns, are liable for neglect of this duty. See, further, *ante*, sec. 560, and note. *Post*, chap. XXIII. sec. 796.

¹ *State v. Hudson County*, 1 Vroom (N. J.) 187, 1862. The opinion in this case, by *Vredenburg, J.*, was evidently prepared with much care, and is highly interesting.

² *Eyman et al. v. People*, 1 Gilm. (Ill.) 8 (neglecting to repair bridge). Further, as to *Bridges*, see chap. XVIII. on Streets, *ante*, sec. 579; chap. XX. on *Mandamus*, sec. 673. *Post*, chap. XXIII.

CHAPTER XXIII.

CIVIL ACTIONS AND LIABILITIES.

Actions on Contracts—Secs. 749–751.

1. Liability on Contracts—*Ultra Vires* as a defence—sec. 749.
2. Liability on *Implied Contracts*, generally—sec. 750.
3. For *Illegal Taxes*, &c., compulsorily collected—sec. 751.

Actions for Torts—Secs. 752–802.

4. No liability in respect to *the exercise of discretionary or legislative powers*—sec. 753.
5. Nor for *imperfect execution* of by-laws—sec. 754.
6. Nor for *misconstruing* extent of public powers—sec. 755.
7. Nor, without a statute creating it, for *buildings demolished* to prevent fire—secs. 756–759.
8. Nor for property destroyed by *mobs*—sec. 760.
9. Implied liability for *neglect of corporate duty*—secs. 761, 778, 779.
10. *Distinction* in this respect between *quasi corporations* and municipal—secs. 761–765.
11. Liability for *torts of officers and agents*—sec. 766.
12. Not liable for acts *ultra vires*—illustrations—secs. 767, 768.
13. But liable for *authorized torts* not *ultra vires*—secs. 769–771.
14. *Respondeat Superior*, when applicable—secs. 772–778.
15. *Respondeat Superior* : Who are, and who are not, *corporate officers*—secs. 773–777.
16. Liability for *neglect of corporate duty*—secs. 761, 778, 779.

17. Liability in capacity of *property owner*—sec. 780.
18. No liability for *acts authorized* by charter or statute—sec. 781.
19. *Streets*.—May *grade and change grade* of streets—secs. 782, 783.
20. *Streets*.—*Remedy* therefor, if given, must be followed—sec. 784.
21. *Streets*.—Liability for *unsafe streets* and sidewalks—sec. 785, *et seq.*
22. *Defective Highways*.—*New England statutes and decisions* on this subject—secs. 786–788.
23. *Streets*.—General liability of *municipal corporations proper* for unsafe streets—secs. 789–793.
24. *Streets*.—Liability of *author of defect* or obstruction—secs. 794, 795.
25. *Streets*.—Defects caused by *railroads*—sec. 796.
26. *Streets*.—Liability as to *watercourses* and *surface water*—secs. 797–800.
27. *Streets*.—*Drains and Sewers*—liability in respect to—secs. 801, 802.

Actions on Contracts.

§ 749. Municipal corporations are subject to be sued upon contracts and in tort. In a previous chapter we have considered at length the authority of such corporations to make contracts, the mode of exercising, and the effect of transcending the power.¹ This leaves but little to add in this place respecting their liability in actions *ex contractu*. Upon authorized contracts—that is, upon contracts within the scope of the powers of the corporation and made by the proper officers or agents—they are liable in the same manner, and to the same extent, as private corporations or natural persons. But upon contracts which are *ultra vires* in the strict sense of that expression, that is, upon those relating to matters wholly outside of the legal powers of the corporation, there is no liability; and the corporation is not

¹ *Ante*, chap. XIV. on Contracts, sec. 370, *et seq.* See, also, *ante*, sec. 648, *n.*; *People v. Bachelier*, N. Y. Court of Appeals, 1873, reported 8 Albany Law Journal, 120; *Winslow v. Commissioners, &c. of County*, 64 North Car. 218, 1870.

estopped to set up the defence.¹ Nor, as we have before stated, is it bound by contracts within the scope of its chartered powers, if made by officers or agents not thereunto duly authorized.*

§ 750. Municipal corporations are liable to actions of

¹ *Ante*, sec 881, and cases cited. Further, as to *ultra vires*, see *post*, *ieca.* 766, 767, 768; also, *Buffett v. Railroad Company*, 40 N. Y. 168, and note; *Grigg v. Foote*, 4 Allen, 195; *Pearce v. Railroad Company*, 21 How. (U. S.) 441, 1858. The subject is well examined and the different senses in which the term *ultra vires* is used is stated by *Sawyer, C. J.*, in the *Miners' Ditch Company v. Zellerbach*, 87 Cal. 543, 1869.

A useful article on *ultra vires*, or, How far corporations are liable for acts not authorized by their charters, will be found in 5 *American Law Review* (January, 1871), 272, in the form of a note to the opinion of *Jervis, C. J.*, in *The East Anglian Railway Company v. The Eastern Counties Railway Company*, 11 C. B. 775, 21 L. J. (N. S.) C. P. 23, 16 Jur. 249, selected because "one of the earliest and most constantly cited of the many cases on the subject, and, after being much criticised, has been followed in the latest English adjudications." After referring to numerous English and American cases, the writer thus states his judgment of the result: "We gather from the cases which have been cited, and from others, that when a corporation is created by a public statute for definite and limited objects, to which its funds are to be applied, a contract which is entirely unconnected with those purposes, or which, on its face, will cause the funds to be applied to other objects, is illegal and void"—citing the cases. * * * "The question whether a particular contract is binding on a particular corporation or not, is to be answered by determining whether, on a fair construction of the charter, it relates to matters connected with the corporate powers and duties. * * * When an act in its external aspect is within the general powers of the company, and is only unauthorized because it is done with a secret, unauthorized intent, the defence of *ultra vires* will not prevail against a stranger who dealt with the company without notice of such intent." *As to effect of having notice.* *Ebbw Vale Co., L. R.* 8 Eq. 14; 5 Am. Law Rev. 283, note. *Estoppel.* *Ib.* 275, and cases cited; *Bradley v. Ballard*, 55 Ill. 413, 420. *Broom Com. Com. Law*, 568.

¹ *Ante*, chap. XIV. secs. 372, 381, 419-426. The city council of a city authorized to borrow money and issue its bonds therefor, ordered its officers to insert on the face of certain bonds the consideration; the officers failed to do it, and it was held that the city was responsible for the acts and omissions of its officers in this respect, and was bound to pay—the court regarding the directions to the officers not a limitation on their powers, but in the nature of private instructions. *De Voss v. Richmond*, 18 Gratt. (Va.) 338, 1868. The opinion of *Joynes, J.*, in this case, treats the power of the corporation to borrow money as one of its *private, and not public* or governmental, powers.

implied assumpsit. The principles governing such liability have already been referred to.¹ Some additional illustrations of it may be here appropriately noticed. Thus, if the officers or agents of a municipal corporation, acting under ordinances which are void, make sales and deeds of corporate property, which pass *no* right to the purchaser, and can never ripen into a title, and receive the purchase money and place the same into the treasury of the corporation, which *appropriates* the money to its own use by virtue of ordinances or resolutions legally adopted, the purchaser may recover back the purchase money, and the sale being void, he need not make or tender a reconveyance before bringing his action.² So a purchaser from a city corporation of its bonds, which are *wholly void for want of power to issue them*, may recover back from the city the money paid, as upon a failure of consideration; and in such case, the bonds being void, it was even held not to be necessary for the plaintiff to offer to return them before bringing

¹ *Ante*, secs. 383-387; *Township v. Township*, 11 Iowa, 506, and cases cited; *Lemington v. Blodgett*, 37 Vt. 215.

² The principle stated in the text was settled, after great consideration, by the Supreme Court of California, in an interesting series of cases known as the "City Slip Cases." *Ante*, sec. 447; *McCracken v. San Francisco*, 16 Cal. 591, 1860; *Grogan v. San Francisco*, 18 Cal. 590, 1861; *Piemental v. San Francisco*, 21 Cal. 351, 1863, where Mr. Chief Justice *Field* reviews the previous cases, and sums up the propositions they establish. See, also, *Saterlee v. San Francisco*, 23 Cal. 314, 1863; *Herzo v. San Francisco*, 33 Cal. 184, 1867. In this last case the principle stated above was re-affirmed, but it was held that the city would not be liable simply by reason of the receipt and retention of the money by its officers or the treasurer; that an appropriation by the city is necessary, which could only be by a valid ordinance; and hence where the appropriation was by virtue of an ordinance which was void, because not passed as required by the charter, the city is not liable, even if the money has been applied in payment of its debts. This last decision was participated in by part of the court only, and it is not clear to our mind that it does not lay down too strict a rule as to the necessity of a valid ordinance to constitute such an *appropriation* or *conversion* of the money, as will make the city liable to refund. See *Dill v. Wareham*, 7 Met. (Mass.) 438. *Ante*, sec. 388.

As to liability of counties on implied contract. *Alton v. Madison County* (pauper), 21 Ill. 115, 1859; *Walcott v. Lawrence County* (denying such liability under statute of Missouri), 26 Mo. 272; *Aldrich v. Londonderry* (pauper), 5 Vt. 441; 17 *Ib.* 79, 447; *Lehigh County v. Kleckner* (erecting county bridge), 5 Watts & Serg. 181. *Post*, secs. 761, 762.

suit, it being sufficient to produce them at the trial to be surrendered.¹ So where two municipal corporations are jointly and equally bound to keep a bridge in repair, and there is a recovery for a neglect of this duty by a traveler against one of the corporations, it may recover contribution from the other.²

§ 751. An important class of actions in form *ex contractu* remains to be noticed. We refer to actions against municipal corporations *to recover back money paid to them for taxes*. They are usually brought in *assumpsit* for money had and received, are equitable in their nature, and lie for money actually paid to the defendant, and which it is against equity and good conscience he should retain. If a tax has been levied upon the plaintiff's property, and if that property is subject to the tax, the amount is justly and equitably due, and cannot, for any mere irregularities in the detail or mode of proceeding, be recovered back. Actions of this description against a municipal corporation are, upon principle and the weight of authority, maintainable when, and in general, only when, the following requisites co-exist: 1. The authority to levy the tax must be *wholly wanting*, or the tax itself wholly unauthorized; in which cases the assessment is not simply irregular, but *absolutely void*. 2. The money sued for must have been *actually received* by the defendant corporation, and received by it for *its own use*, and not as an agent or instrument to assess and collect money for the benefit of the state, or other public corporation or person. And 3. The payment by the plaintiff must have been made *upon compulsion*, to prevent the immediate seizure of his goods or the arrest of the person, *and not voluntarily*. Unless these conditions concur, *paying under protest* will not give a right of recovery. The same principles are applicable to actions for the recovery back of money paid for *illegal license taxes or fines* imposed by a municipal court.³ Nor is a town or city liable

¹ Paul v. Kenosha, 22 Wis. 266, 1867. *Ante*, sec. 382, note.

² Armstrong County v. Clarion County, 66 Pa. St. 218, 1870.

³ Lincoln v. Worcester (city of), 8 Cush. 55, 1851. The opinion in this case is by Shaw, C. J., and the general subject is fully and ably examined, and the prior cases in Massachusetts reviewed, commented on, and distin

to a tax-payer for his proportion of illegal expenses which the corporate authorities may have incurred and paid out of

guished. If it cannot be inferred that the propriety of such actions is to be doubted in any case, it is clearly insisted upon that they should be limited to cases where the plaintiff brings himself within *all* of the conditions stated in the text. *Ante*, sec. 204; *McKee v. Town Council* (municipal fine), *Rice* (South Car.) *Law*, 24, 1838; *Marriott v. Hampton*, 2 Esp. 546; S. C., 2 *Smith's Leading Cases*, 237; *The Collector v. Hubbard*, 12 Wall. 1, 12, 1870; *Supervisors v. Manny*, 55 Ill. 160, 1870.

In *Howell v. Buffalo*, 15 N. Y. 512, 1857, and *Bennett v. Buffalo*, 17 *Id.* 383, *actions of tort* were maintained for the trespass of the officers of the corporation in seizing bank bills to pay void assessments upon the plaintiffs.

The tax or assessment must be illegal and void, and not simply irregular, as defects in mode of assessment, over-evaluation, etc., to authorize its recovery back. *Sumner v. First Parish*, 4 Pick. 361; *Stetson v. Kempton*, 18 Mass. 272; *Osborn v. Danvers*, 6 Pick. 95; *Preston v. Boston*, 12 Pick. 7; *Boston Water Power Company v. Boston*, 9 Met. 199; *Howe v. Boston*, 7 Cush. 273; *Powers v. Sanford*, 39 Maine, 183; *Wright v. Boston*, 9 Cush. 233; *Lee v. Templeton*, 13 Gray, 476; *Cook v. Boston* (money paid for license), 9 Allen, 393; *Boston v. Monroe*, 7 Cush. 125; *First, &c. Society, &c. v. Hartford*, 38 Conn. 274, 1871. The validity of a meeting called by a committee *de facto* cannot be inquired into in an action by an inhabitant against the public corporation to recover back a tax. *Williams v. School District*, 21 Pick. 75, 1838. *Ante*, secs. 204, 214, 716, note, as to acts of *de facto* officers, and void assessment of taxes. As to recovery back of money from city *after payment on execution* in cases where the court had, and also where it had not, jurisdiction to render judgment: *Gordon v. Baltimore*, 5 Gill, 281; *McKee v. Town Council*, *Rice* (South Car.) *Law* (fine), 24, 1838.

The payment must not have been voluntarily made, but made upon compulsion. Where made to prevent or free himself from arrest, or to prevent a levy upon goods under warrant or other process, the law considers the party in duress, and he may recover it back if not liable. *Id.*; *Preston v. Boston*, 12 Pick. 7; *Boston, &c. Glass Company v. Boston*, 4 Met. 181; *Powers v. Sanford* (distress), 39 Maine, 183; *Haines v. School District* (duress: arrest), 41 Maine, 246; *Cook v. Boston*, 9 Allen, 393; *per Perkins, J.*, in *Jenks v. Lima Township*, 17 Ind. 326, 1861, and cases cited; *Allentown v. Saeger*, 20 Pa. St. 421; *Silliman v. Wing*, 7 Hill (N. Y.) 159; *Oates v. Hudson*, 5 Eng. L. and Eq. 469, note; *Elliott v. Swartout*, 10 Pet. 137.

Money voluntarily paid to a corporation, without fraud or imposition for an illegal tax, license, or fine, cannot—there being no coercion, no ignorance or mistake of facts, but only ignorance or mistake of the law—be recovered back from the corporation, either at law or in equity, even though such tax, license, fee, or fine, could not have been legally demanded and enforced. *Id.*; *Robinson v. City Council*, 2 Rich. (South Car.) *Law*, 317, 1846; *Smith v. Hutchinson*, 8 *Id.* 260, 1855; *Elston v. Chicago* (void special assessment), 40 Ill. 514, 1866. The doctrine that in such cases *there is no implied assumpsit* is carefully examined and vindicated by *Carr, J.*, and

money raised by taxes.' The principle has been held to apply to municipal or public corporations, as well as to

Tucker, Prest., in the opinions pronounced by them in *Richmond (city of) v. Judah*, 5 Leigh (Va.) 305, 1834, and which will repay perusal. Same principle. See, also, the full and able opinion of *Walker, C. J.*, in *Town Council v. Burnett*, 34 Ala. 400, 1859, and cases cited; *Christy's Administrators v. St. Louis*, 20 Mo. 143, 1854; *Walker v. St. Louis*, 15 *Id.* 563; *Smith v. Readfield*, 27 Maine, 145.

The same doctrine has been applied to money paid under an *unconstitutional act* of the legislature and ordinances passed in pursuance thereof, the court adopting the principle that money voluntarily paid under a mistake of legal right cannot be recovered back, and that *mere apprehension* of an impending distress warrant did not make the payment a compulsory one. *Baltimore v. Lefferman*, 4 Gill (Md.) 423, 1846, where *Martin, J.*, adverts to the leading authorities, and deduces from them rules substantially the same as those stated in the text. Approved, *Morris v. Baltimore*, 5 Gill (Md.) 244. See, also, *Gordon v. Baltimore*, *Id.* 281. *S. P. Taylor v. Board of Health*, 31 Pa. St. 73, holding that a *threat to use legal remedies* to collect does not make the payment compulsory.

What constitutes compulsory payment. Where a person, on his own motion, goes to the city clerk and pays money as the price of a license, under an ordinance afterwards judicially declared void, the payment is voluntary, and not upon compulsion, although the ordinance imposed a fine and imprisonment, as a penalty for not obtaining a license; hence, in such cases, the money cannot be recovered back in an action against the corporation. *Town Council, &c. v. Burnett*, 34 Ala. 400, 1859.

In Ohio the doctrine is judicially asserted that money will be deemed to have been paid compulsorily not only where the payment was made to release person or property from detention, but also in cases where the parties do not stand on an equal footing, and where the one party, before he would perform a duty enjoined on him by law, illegally compelled or required the other to pay a sum of money to induce or secure such performance. *Baker v. Cincinnati*, 11 Ohio St. 534, 1860, action to recover money paid for theatre license "under protest;" qualifying and explaining *Mays v. Cincinnati*, 1 *Id.* 268. So where a county court gave notice that they would grant a certain ferry to the person who would donate the largest sum to the county, and in accordance therewith, the then holder of the franchise bid the sum of \$500, in an action against the county, he was allowed to recover it back, on the ground that the county authorities had, under the statute, no right to impose any such condition or restriction upon the grant. *County v. Simmons*, 5 Gilm. (Ill.) 516. As to liability of county for a fine paid to it: *Cook v. Freeholders*, 2 Dutch. (N. J.) 326. So, also, in the same state it is decided that a payment is not voluntary if the collector has a

¹ *Washington v. Harvard*, 8 Cush. 66, 1851; *ante*, sec. 732; *New London v. Brainard*, 22 Conn. 552, 1853.

individuals, that money *voluntarily* paid under a claim of right, there being no fraud or mistake of *fact*, although the

warrant by virtue of which he may levy and sell, and this is exhibited to the person paying by the collector; the party in that state not being entitled in such case to replevy personal property. *Bradford v. Chicago*, 25 Ill. 412, 1861.

Money compulsorily paid to a city on a *void assessment* for the purpose of opening a street may be recovered back, the right to such recovery being especially clear if the improvement be abandoned by the corporation. *Bradford v. Chicago*, 25 Ill. 412, 1861. So, it seems, that if in such case the money is voluntarily paid, it may be recovered back, as on the *ground of a total failure of consideration*, when the scheme of the improvement for which the money was collected *has been abandoned*, or is unreasonably delayed by the corporate authorities. *Ib. Ante*, secs. 473-475. In *Kentucky* it is held that an action lies to recover money paid under a clear and palpable *mistake of law or fact*, and when in law, honor, or conscience, it was not due. *Louisville v. Henning*, 1 Bush, 381, 1866. What is such a mistake? *Ib.*; *Noble v. Bullis*, 23 Iowa, 559; *Ripon v. School District*, 17 Wis. 88.

Rules of the civil law and provisions of the Louisiana Code on this subject, which are not entirely coincident with the English and American jurisprudence. See *Worsley v. Municipality*, 9 Rob. (La.) 324, 1844, relating to *wharfage* illegally collected, and *Catholic Society v. New Orleans*, 10 La. An. 73, as to recovery back of taxes assessed upon *exempt property* and voluntarily paid.

Remedy where illegal taxes have reached *state treasury*. *Shoemaker v. Board of Commissioners*, 36 Ind. 175, 1871.

Cases showing when the payment is deemed compulsory, and when voluntary. *Preston v. Boston*, 12 Pick. 7; *Ashley v. Reynolds*, 2 Stra. 916; *Bank v. New Orleans*, 12 La. An. 42; *Louisville v. Zanone*, 1 Met. (Ky.) 151; *Baltimore v. Hefferman*, 4 Gill (Md.) 432; *Morris v. Baltimore*, 5 Gill (Md.) 248; *Walker v. St. Louis*, 15 Mo. 574; *Glass Company v. Boston*, 4 Met. (Mass.) 181, 188; *Town Council v. Burnett*, 34 Ala. 400, 1859, and cases cited; *Philadelphia v. Cooke*, 30 Pa. St. 56; *Allentown v. Sæger*, 20 Pa. St. 421; *Robinson v. Charleston*, 2 Rich. (South Car.) 317; *Shoemaker v. Board of Commissioners*, 36 Ind. 175; *Coulson v. Portland*, Deady, 481; *Dew v. Parsons*, 18 Eng. Com. Law, 87; *Colwell v. Piden*, 3 Watts (Pa.) 327, 328; *County, &c. v. Simons*, 5 Gilm. (Ill.) 513; *Elliott v. Swartout*, 10 Pet. (U. S.) 150; *Clark v. Dutcher*, 9 Cow. 674; *Leonard v. Canton* (license), 35 Miss. 189, 1868; *Harvey v. Olney*, 42 Ill. 386, 1866; *Elston v. Chicago* (special assessment), 40 Ill. 514, 1866; *Cook v. Boston* (license), 9 Allen, 393; *Mylert's Executors v. Sullivan County*, 19 Pa. St. 181.

Under protest.—*Merely paying under protest* does not make the payment a compulsory one. *Lee v. Templeton*, 13 Gray, 476.

As to payment under protest.—*Effect of these words.* *Baker v. Cincinnati*, 11 Ohio St. 534, 1860; *Jenks v. Lima Township*, 17 Ind. 326, 1861; *Taylor v. Board of Health*, 31 Pa. St. 73; *Valpey v. Manley*, 1 C. B. 592; *Parker v. Railroad Company*, 7 M. & G. 253; 4 Met. 181; *Allentown v. Sæger*, 20 Pa.

payor is mistaken in point of law as to his legal liability, is not recoverable back.¹ Thus, where a board of supervisors acting for a county have power "to examine, settle, and allow" all accounts chargeable against the county, their allowance and settlement is binding upon the county, so as to preclude it from recovering back money paid pursuant thereto.² But before payment, the county may, in the author's judgment, defend, notwithstanding the allowance if not liable in law.³

Actions for Torts.

§ 752. We find it impossible to state, by way of definition, any rule so exact as to be of much practical value which will *precisely* embrace the torts for which a private action will lie against a municipal corporation. The difficulty experienced by the courts on this subject has been often confessed, and speaking of it, Mr. Justice *Foote* remarks: "All that can be done with safety is to determine each case as it arises."⁴ It is very justly observed in *Mersey Dock cases*⁵ (relating to the liability of a public corporation required to maintain suitable docks and harbor accommodations, for the use of which they were authorized to demand certain dues), "that in every case the liability of a body created by statute must be determined under a true inter-

St. 421; *Cook v. Boston*, 9 Allen, 398; *Grim v. School District*, 57 Pa. St. 433, 1868.

Legalization of the illegal tax by the legislature before it is recovered back, will defeat the action. *Grim v. School District*, 57 Pa. St. 433, 1868. *Ante*, chaps. IV. XIX. as to extent of legislative power.

Enjoining collection of illegal taxes. See, *ante*, secs. 737, 738; *Coulson v. Portland*, Deady, 481.

¹ *Marriott v. Hampton*, 2 Esp. 546; S. C., 2 Smith Leading Cases, 237; *Clarke v. Dutcher*, 9 Cowen, 674. *Mowatt v. Wright*, 1 Wend. 355; 2 Denio, *infra*, 26, and cases cited on page 40.

² *Supervisors v. Briggs*, 2 Denio, 26, 1846; S. C., 2 Hill (N. Y.) 185; followed, *Smelson v. State*, 16 Ind. 29.

³ *Ante*, sec. 406; sec. 411, and note; sec. 412.

⁴ *Lloyd v. Mayor, &c. of New York*, 1 Seld. 369, 375, 1851.

⁵ *Mersey Docks v. Gibbs*; *Same v. Penhallow*, Law R. 1 H. L. Cases, 98; S. C., 1 H. & N. 439; 3 *Ib.* 164, approved by *Rives, J.*, in his learned opinion in *Richmond v. Long's Administrators*, 17 Gratt. (Va.) 375.

pretation of the statutes under which it is created." We can, perhaps, most satisfactorily ascertain the state of the law respecting the liability of municipal corporations in actions for torts, by referring to, and, as far as possible, classifying, the cases (which may be grouped according to the subject matter) in which such liability has been judicially asserted or denied. And first, we will mention certain cases in which these corporations are *not liable* to civil actions, unless the liability be expressly created by statute.

§ 753. A municipal corporation is not liable to an action for damages either for the non-exercise of, or for the manner in which in good faith it exercises, *discretionary powers* of a public or legislative character. So, where such a corporation has a discretion as to the time and manner of making corporate improvements, as for example, grading streets, making sewers, drains, vaults, etc., building market houses, improving its harbor, and the like, neither *mandamus* nor a private action will lie against the corporation for *omitting or neglecting* to act; and the reason is, that such powers are conferred to be exercised or not, as the public interest is deemed to require. and there is no implied liability for deciding either that the public interest does not require action, or that it requires action in a particular way.¹

¹ *Wilson v. Mayor, &c.*, of New York, 1 Denio, 595, 1845. Followed, *Cole v. Medina*, 27 Barb. 218, 1858; *Lacour v. Mayor, &c.*, of New York, 3 Duer, 406, 1854. *Post*, sec. 800-802; *White v. Yazoo City*, 27 Miss. 357, 1854; *Griffin v. Mayor*, 9 N. Y. 456, 1853, and cases cited; followed, *Dewey v. Detroit*, 15 Mich. 307, where the council had a discretion as to the number of subordinate officers it would appoint; *Western College v. Cleveland*, 12 Ohio St. 375, 1861; *Carr v. Northern Liberties* (authority to construct sewers), 35 Pa. St. 324, 1860; *Bennett v. New Orleans*, 14 La. An. 120, 1849; *Cooley Const. Lim.* 208. *Infra*, sec. 760; *Kelly v. Milwaukee* (damage by swine at large), 18 Wis. 88, 1864; *Joliet v. Verley*, 35 Ill. 58, *per Beckwith, J.*; *Goodrich v. Chicago*, 20 Ill. 445, 1859, in which it was held where a city corporation had, among other powers, express authority "to remove all obstructions in the harbor," that it was not liable to a party who received damages from a sunken hulk therein, if the city had never undertaken to exercise the power granted to it to clear out the harbor. If, however, says *Caton, J.*, the city had entered upon the work of removing the hulk, and in doing so had carelessly left it in an exposed situation, by reason of which a navigator's vessel was injured, it would be liable for such negligence. See.

There may be, however, as elsewhere shown, an implied liability for the negligent or unskillful manner in which *strictly corporate powers*, as distinguished from *public powers*, are carried into execution, although there was no perfect duty resting on the corporation to enter upon the works or undertakings involving the exercise of such powers.¹ But the liability in such cases attaches only when the duties cease to be judicial in their nature, and become purely ministerial.²

§ 754. Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation *is not bound to provide for and secure a perfect execution of its by-laws*, and it is not responsible in a civil action for the neglect of duty on the part of its officers in respect to their enforcement, though such neglect result in injuries to private persons which would otherwise not have happened.³

§ 755. A municipal corporation is not liable to a private individual for losses caused by its having *misconstrued the*

on this point, *infra*, secs. 772-778; *Mayor, &c. v. Furze*, 3 Hill (N. Y.) 612, explained in *Wilson v. Mayor, &c.*, 1 Denio, 595, 600, and in *Mills v. Brooklyn*, 32 N. Y. 489, 1865, cited *infra*, sec. 801; *Dayton v. Pease*, 4 Ohio St. 80, 1854.

As to mandatory and discretionary powers, see *ante*, secs. 62, 669, 689. *Post*, secs. 800, 801, 802. *Steines v. Franklin Co.*, 48 Mo. 167.

¹ *Post*, secs. 755, note, 778, 789, 790, 802.

² *Post*, sec. 802.

³ *Levy v. The Mayor, &c., of New York*, 1 Sandf. S. C. R. 465, relating to injury committed by swine running at large in the streets in violation of by-laws, cited with approval, 11 N. Y. (1 Kern.) 396, and see cases there cited, and in *Griffin v. The Mayor, &c., of New York*, 9 N. Y. (5 Seld.) 456, 459, *per Denio*, J. *S. P. Peck v. Austin* (market ordinance), 2 Texas. 162, 1858, in which the court, admitting that such a corporation may be liable for "the wrongful acts of its officers done under its authority, and pursuant to its will, express or implied," say that "such a rule cannot be enforced in this case, because the act, or non-action, of the officers complained of, was contrary to the will of the corporation as expressed in the ordinance." See also, observations (*arguendo*) of *Marshall, C. J.*, in *Fowle v. Alexandria*, 3 Pet. 398, 409, 1830; *Lorrillard v. Monroe*, 11 N. Y. (1 Kern.) 392, 396, 1854, affirming *S. C.*, 12 Barb. 161. As to who are *corporate officers*, and what are *corporate duties*, see *infra*, secs. 755, 758, 772-778, 800, 802.

As to contract to enforce ordinances, see *Le Claire v. Davenport*, 18 Iowa, 210. *Ante*, sec. 818; *Gale v. Kalamazoo*, 28 Mich. 344, 1871.

extent of its powers, and issued a license which it had no authority to grant.¹ The license in the case just cited from the United States Supreme Court² was granted by the corporation, without authority therefor, to a person to exercise the trade of auctioneer, and the plaintiff having sustained losses from his fraudulent conduct, brought an action against the city, the injury alleged in the declaration being an omission by the city to take a bond, as required by law, and the corporation having no authority to require or take such a bond, it was held that the action could not be maintained. The court observed that the auctioneer was not "the officer or agent of the corporation, but acted for himself, as entirely as a tavern keeper or other person who carries on any business under a license from the corporate body." The proposition may, we think, be affirmed as unquestionably sound, that the licensees of a municipal corporation to exercise any independent trade or business for their own profit are not the officers or agents of the corpo-

¹ *Fowle v. Alexandria*, 3 Pet. 398, 1830; S. C. below, 3 Cranch C. C. 70. *Ante*, secs. 381, 749. *Infra*, sec. 766. Nor is a municipal corporation liable for the act of its council in *erroneously*, but without any corruption or malice, *refusing to grant a retail license*, by mistake supposing it had discretion over the subject, when in fact it had none. The exemption from liability is placed by the court upon the ground that such functions are substantially judicial in their nature. *Duke v. Rome*, 20 Ga. 635, 1856; *White v. Yazoo City*, 27 Miss. 357, 1854. *Supra*, sec. 753. *Post*, sec. 801.

² *Fowle v. Alexandria*, *supra*. In *Cole v. Nashville*, 4 Sneed (Tenn.) 162, 1851, arising on demurrer to the declaration, it was properly held that as the *municipal corporation had no jurisdiction over lunatics*, and no power and no duty to arrest and confine them, or to take measures for this purpose, it could not be made liable for a *supposed omission of duty* for not doing so. *Post*, sec. 766. But in the same case it was also decided that if such a corporation, or its officers, *knowing that a person was a lunatic, granted him a license to carry on a dangerous avocation*, as that of a druggist, it was liable in damages to a party injured by such person while in pursuit of the business for which he was thus licensed. This decision was based upon the ground that the injury which happened was a natural and probable result of the power granted, and that such corporations are liable for the wrongful acts and neglect of their officers in the course, and within the scope, of their employment. But was the act of granting a license to a druggist a *corporate act*? Was it not rather a public power to be exercised by the corporation as a public agency of the state? And if so, the acts or neglect of the officers would impose no liability on the corporation. *Ante*, sec. 89. *Post*, secs. 753, 763, 772-778.

ration so as to make it liable, on the principle of *respondere superior*, for their conduct.

§ 756. The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex*. Upon this principle, *in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures* in a city or compact town, to prevent the spreading of an existing conflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains. The ground of this exemption from liability is the *public necessity*, the public good, and, therefore, if the public good did not require the act to be done—if the act was not apparently and reasonably necessary—the actors can not justify, and would be responsible.¹

§ 757. Municipal corporations, or certain officers thereof, are sometimes appointed, by charter or statute, "*agents to judge of the emergency*," and direct the performance of acts which any individual might do at his peril, without any statute at all."² And, by statute or charter, such corpora-

¹ *Mouse's Case*, 12 Co. 63; *Ib.* 13, where Lord Coke says: "For the Commonwealth, a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do, without being liable to an action." *Maleverer v. Spink*, 1 Dyer, 36, b; *Governor, &c. v. Meredith*, 4 T. R. 797, *per Buller, J.*; *Respublica v. Spaihawk*, 1 Dallas, 337, and authorities cited by *McKean, C. J.* "We find indeed, a memorable folly recorded in the third volume of Clarendon's history, where it is mentioned that the lord mayor of London, in 1665, when that city was on fire, would not give directions for, or consent to, the pulling down of forty wooden houses, or to removing the furniture, &c., belonging to the lawyers of the temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half of that great city was burned." *Ib.*; 15 Vin. Abr. title "*Necessity*," pl. 8; 2 Kent Com. 338; *Taylor v. Plymouth*, 8 Met. 462, 465, 1844, *per Shaw, C. J.*; *Mayor, &c. of New York v. Lord*, 18 Wend. 126; affirming S. C., 17 Wend. 285, 1837; *Cornwell v. Emerie*, 2 Ind. (Cart.) 85, 1850. See, also, the interesting cases of the American Print Works, 3 Zab. (N. J.) 590, 1851; affirming S. C., *Ib.* 9; and see S. C. on former appeal, 1 Zab. 248; *Ib.* 714, which arose out of the great fire of 1835, in the city of New York.

² *People v. Winnehammer*, 12 How. Pr. Rep. (Court App.) 260, *per Comstock, J.*; *S. P. per Selden, J.*, *Ib.* 274; *Russell v. Mayor of New York*, 2

tions are not unfrequently made liable for damages which individuals may sustain for buildings or property which are destroyed under the direction of the proper officers, to prevent the extension of a fire. *The liability of the municipal corporation in such cases is purely statutory*, and hence, in order to charge it, the case must be clearly and fairly within the enactment.¹ Thus, where the statute allows such a recovery only when a building is demolished by the order of *three* fire wards or directors, a destruction of it by the order or direction of one of these officers creates no liability against the corporation; and a *by-law* authorizing one to exercise, in urgent cases, the powers of the three, was adjudged void.²

Denio, 461, 474, 1845, opinions of *Sherman* and *Porter*, Senators. *Infra*, sec. 772, note.

¹ *Taylor v. Plymouth*, 8 Met. 462, 465; *Hafford v. New Bedford*, 16 Gray 297; *McDonald v. Red Wing*, 13 Minn. 38, 1868; *Sarocco v. Geary*, 3 Cal. 69; *Dunbar v. San Francisco*, 1 Cal. 355, 1850; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Western College v. Cleveland*, 12 Ohio St. 375, 1861, *per Gholson, J.*; *Fisher v. Boston*, 104 Mass. 87. *Contra*: *Bishop v. Macon*, 7 Ga. 200, 1849; but the subject of *corporate* liability for the act of mayor and council in ordering the destruction is not distinctly discussed. *Lumpkin, J.*, seems erroneously to suppose or assume that there is an *implied assumpsit* on the part of the city for the destruction of such property as might otherwise have been saved to the owner.

² *Coffin v. Nantucket*, 5 Cush. 269, 1850. Note remarks of *Metolf, J.*, 272, as to whether a *majority* of the fire wards or directors could lawfully authorize the destruction of buildings. *Ante*, secs. 221, 251. See, also, *Ruggles v. Nantucket*, 11 Cush. 433, 1853, on this point, and on the construction of the word "owner." As to the estate or interest necessary to justify recovery, and as to the right of recovery for *personal property* under the New York statute (2 Rev. Laws, 368), see *Stone v. Mayor, &c., of New York*, 25 Wend. 157, 1340, affirming S. C., 20 Wend. 139; *Mayor, &c., of New York v. Lord*, 18 Wend. 126; 17 *Ib.* 285. *Insurance*.—It is held that the fact that the owner is insured does not affect the right of recovery or the amount to be recovered of the corporation. The *insurers* are entitled to be subrogated to all the rights of the owner or assured, and to have applied on their policies the amount received by him from the corporation. *Mayor, &c., of New York v. Pentz*, 24 Wend. 669, 1840. And see *Pentz v. Etna Insurance Company*, 9 Paige, 568; *City Fire Insurance Company v. Corlies*, 21 Wend. 367. *Interest*.—Interest on the amount should be allowed from time of destruction. *Mayor, &c. v. Pentz*, 24 Wend. 668; 25 *Ib.* 157. But not intermediate the time of assessment and confirmation by the court: *Lord v. Mayor, &c., of New York*, 3 Hill, 426. *Evidence*.—The opinions of *by-*

§ 758. The city council of Charleston, acting under the general municipal powers of the city, and without any special statute creating a liability, adopted an ordinance authorizing the intendant, among other officers, in time of fire, to demolish such buildings "as may be judged necessary" by him to prevent the further spread of fire, thereby investing this officer with the power to judge whether the necessity existed. A fire being in progress, the plaintiff's house was blown up by the order of the intendant, and the fire was subsequently extinguished before it reached his house, and he brought his action of trespass against the city, claiming that the property had been destroyed by the intendant without necessity, and that the ordinance authorizing the intendant to destroy the property for the benefit of the city, was sufficient to charge the *city corporation* in case the plaintiff established that the destruction was unnecessary, and that the discretion of the officer had been abused. The court decided that the plaintiff could not recover, placing its judgment upon the broad ground that the city, being a public corporation, was not liable to an action by individuals, unless it be given by statute.¹

§ 759. As one whose property has been destroyed by the order of the public authorities, for the public benefit, has a strong natural equity for compensation, and as *statutes making the public corporation liable are remedial*, while they are not to be strained to cover cases not fairly embraced by them, they are yet to be liberally expounded.¹

standers as to whether the buildings destroyed *would* have taken fire, not admissible; as to the opinion of *firemen, quære*. Mayor, &c. v. Pentz, 24 Wend. 668.

¹ White v. Charleston, 2 Hill (South Car.) 571, 1835. The result was right, but assuming the power to pass the ordinance, the decision should be placed, we think, upon the ground that the intendant was discharging a *public*, as distinguished from a *municipal* or *corporate* duty, and is not in this matter to be regarded as the agent of the city, and therefore the city would not, on the principle of *respondet superior*, be responsible for his acts. *Ante*, secs. 39, 754; *post*, secs. 772-778, 800-802; Fisher v. Boston, 104 Mass. 87; Hafford v. New Bedford, 16 Gray, 277; Wheeler v. Cincinnati, 19 Ohio St. 19.

² Mayor, &c. of New York v. Lord, 17 Wend. 285, 292, 1837, *per Nelson*, C. J.; affirmed, 18 Wend. 126; Mayor, &c. v. Pentz, 24 Wend. 668 Stone

If the statute creating the liability against the corporation points out *the remedy*, that alone can be pursued. Hence if the statute provides for an assessment, a civil action will not lie against the corporation.¹ But if the statute gives the right and prescribes no specific remedy, an action may be brought.²

§ 760. Public or municipal corporations are under no common law liability to pay for the *property of individuals destroyed by mobs or riotous assemblages*;³ but in such

v. Mayor, &c., 25 Wend. 157. In Massachusetts it is held that the statute does not apply to a building which is pulled down by order of the public officers *after* it is so far burnt that it is impossible to save it. *Taylor v. Plymouth*, 8 Met. 462, 1844. And the New York statute does not impose a liability on the corporation for property which would inevitably have been destroyed by the fire. *Pentz v. Ætna Insurance Company*, 9 Paige, 568; *Mayor, &c. of New York v. Lord*, 17 Wend. 285.

¹ *Russell v. Mayor, &c. of New York*, 2 Denio, 461, 1845. Same principle: *Infra*, sec. 784; *supra*, secs. 658-656.

² *Lowell v. Wyman*, 12 Cush. 273, 276, 1853.

³ *Western College v. Cleveland*, 12 Ohio St. 375, 1861. It was held in this case that a provision *inter alia* in the constituent act of the city that it "shall be the duty of the council to regulate the police of the city, preserve the peace, prevent riots, disturbances, and disorderly assemblages," had reference to the passage of ordinances to be enforced by officers appointed for the purpose, and did not make the city responsible for the riotous destruction of property, or the neglect of the officers of the city in not preventing such destruction. *Supra*, sec. 753. See, also, *Prather v. Lexington*, 13 B. Mon. 559, 1852; *Ward v. Louisville*, 16 Ib. 184, 1855. In these cases liability was sought to be grounded on the existence of power in the officers *to prevent and suppress mobs, and their failure and neglect of duty in this respect*. The court did not regard the omissions or acts of the executive officers of the city as imposing any liability on the city in her corporate capacity. *Cheaney v. Hooser*, 9 B. Mon. 330, 1848. In further support of the doctrine stated in the text, see, *supra*, sec. 753. *In re Pennsylvania Hall*, 5 Pa. St. 204, 1847; *Fauvia v. New Orleans* (construing statute), 20 La. An. 410; *Howe v. New Orleans*, 12 La. An. 481; *Baltimore v. Poultney* (construing Maryland legislation), 25 Md. 107, 1866; *Duffy v. Baltimore*, Taney C. C., 200, 1852; *Williams v. New Orleans*, 23 La. An. 507, 1871; *Hagerstown v. Dechert*, 32 Md. 369, 1869; *Martin v. Mayor, &c. of Brooklyn*, 1 Hill (N. Y.) 545, 551; *Underhill v. Manchester* (liability of towns under statute), 45 N. H. 214; *Chadbourne v. Newcastle*, 48 N. H. 196; *Bailey v. The Mayor, &c.*, 3 Hill, 531; *Buttrick v. Lowell*, 1 Allen (Mass.) 172; *Ely v. Supv.*, 36 N. Y. 297; *Dale County v. Gunter*, 46 Ala. 118, 1871; *Jewberry v. New York*, 1 Sweeney (N. Y.) 369, 1869.

case, the legislature may constitutionally give a remedy, and regulate the mode of assessing the damages.¹

§ 761. In considering the subject of the *implied liability* of municipal corporations to civil actions for misconduct or neglect on their part, or on the part of their officers, in respect to corporate duties, resulting in injuries to individuals, it is essential, under the authorities, to bear in mind the distinction pointed out in a former chapter,² and to be noticed again hereafter,³ between *municipal corporations proper*, such as towns and cities specially chartered or voluntarily organizing under general acts, and *involuntary quasi corporations*, such as townships, school districts, and counties (as these several organizations exist in most of the states), including therein for this purpose the peculiar organization, before referred to, known as the New England town.⁴ The decisions of the courts in this country are almost uniform in holding the former class of corporations to a much more extended liability than the latter, even where the latter are invested with corporate capacity and with the power of taxation;⁵ but respecting the *grounds* for this difference there is considerable diversity of opinion. The

Darlington v. Mayor, &c. of New York, 31 N. Y. 164, 1865, cited *ante*, sec. 39, and notes. *In re Pennsylvania Hall*, 5 Pa. St. 204, 1847; Russell v. Mayor, &c. of New York, 2 Denio, 461, 1845; Lowell v. Wyman, 12 Cush. 273, 276, 1853; Gray v. Brooklyn, 19 Abb. (N. Y.) Pr. Rep. N. S. 186, 1869. It is held, under the statutes of Kansas, that an action against a city, for damages resulting from the killing of a man by a mob should be brought in the name of the personal representative of the deceased. *Atchison v. Twine*, Supreme Court Kansas, 1872.

¹ *Ante*, chap. II. secs. 10, 39.

² *Infra*, secs. 762, 785, 789.

³ *Ante*, secs. 11-13.

⁴ *Ante*, sec. 10, and note; sec. 39; *Soper v. Henry County*, 26 Iowa, 264, 1868; *Freeholders v. Strader*, 3 Harr. (N. J.) 108, 1840; approved, 3 Dutch. (N. J.) 415; *Cooley Const. Lim.* 240, *et seq.*; *Niles Township v. Martin*, 4 Mich. 557; *Larkin v. Saginaw County* (defective bridge), 11 Mich. 88; *Lesley v. White*, 1 Speers (South Car.) Law, 31; *Young v. Commissioners, &c.*, 2 Nott & McCord, 537; *Carroll v. Board*, 23 Miss. 38; *Anderson v. State*, 23 Ib. 459; *Hedges v. Madison County*, 1 Gilm. (Ill.) 567. *Infra*, secs. 762, 763, 766, 785, 789, and cases cited.

In Maryland, county liable for injuries caused by unsafe roads and bridges. *County Commissioners v. Gibson*, 36 Md. 229, 1872.

principle involved lies at the basis of a large class of actions against municipal corporations, and it is desirable briefly to examine it in the light of the adjudications which have established it. It may in the first place, be remarked, that it is a general principle of law, founded in reason, that where one suffers an injury by the neglect of any duty owing to him which rests upon another, the person injured has his action. This doctrine applies not only to individuals, but to *private corporations aggregate*, and it obliges such corporations to respond in a private action, though such action be not expressly given by statute, for the damages which another may suffer by reason of neglect or default to perform any *corporate duty*.¹

§ 762. In this state of the law the question was presented for decision at an early day in Massachusetts, whether *towns* in that state (the statute being silent upon the subject), stood upon the same footing as respects liability for damages arising from their neglect of duty as individuals and private corporations, and it was decided they did not, and that in order to subject them to a civil action in favor of an individual for neglect in respect to their public duties, though enjoined by statute, the legislature

¹ As to private corporations, this is well illustrated by the early case in Massachusetts, of *Riddle v. Proprietor of Locks and Canals, &c.*, 7 Mass. 169. This was an action of *case* against the defendants, a canal corporation, who were bound by their charter to construct their canal so deep and wide that rafts of a certain description could pass through it when the same could pass the river with which it was connected, but which failed, to the plaintiff's injury, thus to construct their canal. It was objected that no private action lay against a corporation for a breach of its duty, even though special injury was suffered, the only remedy being by information or indictment. And it was specially urged that there were technical objections to maintaining trespass or trespass upon the case. These objections were disposed of in the most satisfactory manner by the terse and luminous judgment of *Parsons, C. J.*, who decided that the action would lie, and placed the decision upon the broad and clear grounds stated in the text; viz: that private corporations, *i. e.* corporations created for their own benefit, equally with individuals, are liable for any damages which another may suffer by reason of any neglect or default to perform any corporate duty. *Weid v. Proprietors, &c.*, 6 Greenl. 93 (liability of boom companies); *Ward v. Turnpike Company, Spencer (N. J.)* 323, 325; *Parnaby v. Canal Co.*, 11 A. & E. 228.

must expressly give the action. Applying this principle, it was accordingly held, in *Mower v. Leicester*,¹ that a town was not liable in a common law action for damages sustained by an individual through a *defect in the highways of the town*. This case, or the English case upon which it was based,² has been generally followed throughout the New

¹ *Mower v. Leicester*, 9 Mass. 247, 1812.

² *Russell v. The Men dwelling in the county of Devon*, 3 Term R. 661. In this case an individual brought his action against the county for an injury he sustained by its neglect to repair a county bridge. The duty to repair was admitted. That defendant was liable to indictment for neglect to repair was conceded. And inasmuch as it had no *corporate fund*, or means of obtaining such a fund, out of which a judgment could be satisfied, and because each inhabitant would be liable to satisfy the judgment, which might be levied on one or two individuals, who would have no (practicable) means whatever of reimbursing themselves, it considered that the action could not be maintained. But this reason does not apply to ordinary chartered municipalities, nor, in fact, to any public body having a corporate fund, or the means of obtaining one, out of which the judgment may be satisfied. In *Riddle v. Proprietors, &c.*, 7 Mass. 169, 187, the decision in *Russell v. Devon*, *supra*, is considered as based upon "sound reason," and it was approved in England in *Mackinnon v. Penson*, 25 Eng. Law and Eq. 457, 1854. It is reviewed and commented on in many subsequent cases; see particularly: *Weightman v. Washington*, 1 Black, 39, 52, 53; *Morey v. Newfane*, 8 Barb. 645; *Young v. Commissioners, &c.*, 2 Nott & McCord (South Car.) 537; *Beardsley v. Smith*, 16 Conn. 375; *Ball v. Winchester*, 32 N. H. 443; *Eastman v. Meredith*, 36 N. H. 284, 1858, cited, *infra*, sec. 763, note.

Mode of enforcing liabilities of New England towns. It may here be remarked that, at common law, corporators are not personally liable for the debts of the corporation; but by usage and practice, peculiar in this country to the New England States, quasi corporations, as towns, counties, and parishes, are an exception to this rule, and private property may be taken to satisfy a corporate judgment. The history of this anomalous usage, and the reasons for it, are stated at large by *Church, J.*, in *Beardsley v. Smith*, 16 Conn. 368, 1844. See, also, *Union v. Crawford*, 19 Conn. 331; *Fernald v. Lewis*, 6 Greenl. 264, 268, *per Weston, J.*; *Brewer v. New Gloucester*, 14 Mass. 216; *Merchants' Bank v. Cook*, 4 Pick. 405, 414; *Chase v. Merrimack Bank*, 19 Pick. 564; *Gaskill v. Dudley*, 6 Met. 551. Remedy of inhabitant over. *Beers v. Botsford*, 3 Day (Conn.) 159. But it is otherwise in case of corporations proper; and, out of New England, the author is aware of no instance, even in the case of quasi corporations in which, without a statute to that effect, private property has been considered liable to pay public debts. *Ante*, sec. 446; also, sec. 685, note; sec. 693, note; *North Lebanon v. Arnold*, 47 Pa. St. 488.

England States, and has resulted in the establishment therein, and in the very general recognition elsewhere, of the doctrine that without a statute giving it, no private action lies against towns in New England or other *quasi* corporations for the neglect of duties enjoined on them by general legislative enactment applicable to all such corporations as governmental or public agencies. Accordingly, in the different states, organizations such as counties, townships, school districts, road districts, and the like, though possessing corporate capacity and power to levy taxes and raise money, have been very generally considered *not to be liable in case, or other form of civil action, for neglect of public duty, unless such liability be expressly declared by statute.*¹

¹ Treadwell v. Commissioners, 11 Ohio St. 190, *per Gholson, J.*; Hedges v. Madison County, 1 Gilm. (Ill.) 567; Freeholders v. Strader, 3 Harr. (N. J.) 108; Van Eppes v. Commissioners, 25 Ala. 460, 1854; Larkin v. Saginaw County, 11 Mich. 88; Bray v. Wallingford, 20 Conn. 416, 419. *Supra*, secs. 10, 39, 761, and cases cited.

Liability of counties for neglect of officials, &c. A county, though it has power to erect and repair public buildings, and to levy and collect a tax for that purpose, *is not responsible*, in the absence of a statute making it so, for injuries resulting from the unsafe and dangerous condition of county buildings, especially where there exists no statute authorizing the levy of a tax to satisfy such a judgment. A county was accordingly held not to be liable for an injury suffered by the plaintiff who, when in attendance upon court as a witness, was precipitated into the cellar of the court-house in consequence of the *negligent omission of the agents or officers of the county to guard or light a dangerous opening leading into the cellar.* Commissioners of Hamilton County v. Mighels, 7 Ohio St. 109, 1857, cited *ante*, sec. 10a, note, overruling the early case of The Commissioners v. Butt, 2 Ohio, 348 recognized, but without examination, as authoritative, in Richardson v. Spencer, 6 Ohio, 18; following, Russell v. The Mayor of Devon, 2 Term R. 661; approving, Riddle v. The Proprietors, &c., 7 Mass. 169; Mower v. Leicester, 9 Mass. 247; Young v. Commissioners of Roads, 2 Nott & McCord (South Car.) 537; White v. City Council, 2 Hill (South Car.) 571; Ward v. County of Hartford, 12 Conn. 404; Freeholders v. Strader, 3 Harris (N. J.) 108; Hedges v. County of Madison, 1 Gilm. (Ill.) 557; Fowle v. Alexandria, 3 Pet. 409; Morey v. Newfane, 8 Barb. 645. See similar case of Eastman v. Meredith, *infra*, sec. 763, note. It was said, *arguendo*, in 7 Ohio St. 109, *supra*, that a municipal corporation proper would, under like circumstances, have been liable. See, on this point, *infra*, secs. 772-779. So, in Georgia, a county, although it is its duty to keep a good and sufficient jail, *is not liable for an escape caused by the insufficiency of the jail*, though the sheriff may have been made liable therefor, there being no statute giving

§ 763. In New England, as will hereafter be shown, there is, indeed, a liability upon both cities and towns for injuries caused by unsafe or defective highways and streets, but this liability is wholly and strictly statutory. The rule of law just mentioned is there adhered to, but it is not of universal application even as to towns, for it is considered that there may be instances in which they are civilly liable for neglect of duty without an express statute to that effect.¹ Speaking of the rule established in the before mentioned case of *Mower v. Leicester*, that a private action cannot be maintained against a *quasi* corporation for neglect of corporate duty unless the action be given by statute, Mr. Justice *Metcalf*, in a quite recent case,² says: "And so it has ever

such an action. *The Governor v. Justices, &c.*, 19 Ga. 97, 1855, citing *Russell v. Men of Devon*, 2 Term Rep. 661. *S. P. Haygood v. Justices*, 20 Ga. 845. See, also, *Peters v. State*, 9 Ga. 109. *County courts* in Missouri are not agencies of the county, but a branch of the state judiciary, and hence the county is not liable for their judicial action, or non-action. *Miller v. Iron County*, 29 Mo. 122; *State v. St. Louis County Court*, 84 Mo. 546. *The county is part of the body of the state.* *Commonwealth v. Brice*, 22 Pa. St. 211. Is liable as at common law for services of *physicians* in making a *post mortem* examination at request of coroner. *Allegheny County v. Shaw*, 34 Pa. St. 301. But not liable for *medical treatment of prisoners* taken ill on his trial. *Commonwealth v. Hall*, 7 Watts, 290; *supra*, sec. 750, n. Liability of counties on *warrants or orders*. See Index: *Orders—warrants*.

¹ *Oliver v. Worcester*, 102 Mass. 489, 496, 1869; *Blodgett v. Boston*, 8 Allen, 237, 1864; *Stickney v. Salem*, 3 *Ib.* 374; *Chisey v. Canton*, 17 Conn. 475, 478, 1846; approving *Mower v. Leicester*, 9 Mass. 247; *Reed v. Belfast*, 20 Maine, 246. *Infra*, secs. 786, 787.

² *Bigelow v. Randolph*, 14 Gray (Mass.) 541, 543, 1860. *Eastman v. Meredith*, 36 N. H. 284, 1856, and *Conrad v. Ithaca*, 16 N. Y. 158, 1857, elsewhere referred to, are approved. See also, *ante*, secs. 10a, 39; *supra*, sec. 761, *et seq.*; *post*, secs. 772-778, 800-802.

New England town.—Liability for neglect of public duty.—Defective town house. The question of the right to maintain an action against a New England town (the nature of which has been before considered), for neglect of duty, in the absence of statute either giving or prohibiting such an action, was learnedly and ably examined by the Supreme Court of New Hampshire, in the case of *Eastman v. Meredith*, just mentioned and heretofore referred to (*ante*, sec. 12). The material facts were, that the defendant (the town of Meredith) built a town house, in which, among other purposes, to hold town meetings. The house, by the negligence of those who built it for the town, was so defectively constructed that the flooring, at an annual town meeting, gave way, and the plaintiff, an inhabitant and legal voter, in

since been held by this and other courts. *This rule of law, however, is of limited application.* It is applied in the case of towns only to the neglect or omission of a town to perform those duties which are imposed upon *all* towns, without their corporate assent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it, at its request. In the latter cases, a town is subject to the same liabilities, for the neglect of those special duties, to which private corporations would be, if the same duties were imposed or the same authority conferred

attendance upon the meeting, received a serious bodily injury. The plaintiff's injury was caused by the insufficiency of the building. The court concedes for the argument, that it was the duty of the town to provide a safe and suitable place for holding town meetings (see *ante*, sec. 10, note), and treating the case on this basis, states the question to be decided thus: "Whether a citizen of the town who suffers a private injury in the exercise of his public rights from neglect of the town to perform this public duty, can maintain an action against the town to recover damages for the injury?" It was held that the plaintiff could not recover; and this decision rests mainly upon the ground that a statute is necessary, and has been uniformly so considered in New England since the early cases of *Riddle v. Locks, &c.*, 7 Mass. 169, 187 (*supra*, sec. 762, note), and *Mower v. Leicester*, 9 Mass. 250 (*supra*, sec. 762), in order to subject towns to a civil action for neglect to perform a public duty. Towns in New Hampshire and the New England States, it is stated, are created by general law. They give no assent, at least no express assent, to the act creating them. They are involuntary territorial and political divisions of the state, for the purposes of government and municipal regulation. They are declared by statute to be corporations, but this does not enlarge their duties or liabilities (*ante*, §§ 10-12). The case was considered to be one of new impression, and on these grounds was distinguished by the court from cases in England decided under charters which imposed a public duty upon the corporation as the *condition or price of the corporate franchises*, and from cases decided in other states in this country, in which cities and towns have been held liable to a civil action for neglect to perform public duties growing out of grants conferring special powers and privileges for local advantage or benefit. *Ante*, sec. 39; see *infra*, secs. 764, 772-778, 779, 802.

Conformably to these principles, it was held in *Bigelow v. Randolph*, 14 Gray, 541, above cited, that a town in Massachusetts which has assumed the duties of a school district is *not liable for an injury sustained by a scholar attending the public school from a dangerous excavation in the school house yard*, owing to the negligence of the town officers. *Unsafe court house. Supra*, sec. 762, note.

on them—including their liability for the *wrongful neglect* as well as the *wrongful acts of their officers and agents*.”

§ 764. But as respects *municipal corporations proper*, whether specially chartered or voluntarily organizing under general acts of the character before alluded to,¹ it is, we think, universally considered, even in the absence of a statute giving the action, that they are liable for acts of *misfeasance* positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties; and it is the almost, but not *quite*, uniform doctrine of the courts, that they are also liable where the wrong resulting in an injury to others consists in a *mere neglect* or omission to perform an *absolute and perfect* (as distinguished from a discretionary, *quasi* judicial, or imperfect) *corporate* duty, owing by the corporation to the plaintiff, or in the performance of which he is specially interested.² But there is, as elsewhere stated, not a little diversity of opinion as to what duties are *corporate* duties, and when officers, though appointed or elected by the corporation, are to be regarded as the officers of the corporation, and not of the state or the general public.³ And especially have the courts been much perplexed respecting the *principle* upon which to rest the distinction, so generally taken, by which what is termed a *quasi* corporation, though possessing full corporate capacity and a corporate purse, is not *impliedly liable* for acts of misfeasance or neglect of public duty on the part of its officers and agents, while for the same or a similar wrong there is such a liability resting on municipal or chartered corporations. *But the distinction, whatever its ground, is well established*; and the latter class of corporations is considered to be impliedly liable for acts done in what is termed their *private* or *corporate character*, and from which they derive some special or immediate advantage or emolument, but not as to

¹ *Ante*, secs. 20, 24, 26.

² *Post*, sec. 778, and cases cited; secs. 800–802; Broom Com. Com. Law, 651–671.

³ *Supra*, secs. 39, 755, 758, 761–763; *infra*, 772–778.

those done in their *public capacity*, as governing agencies, in the discharge of duties imposed for the public or general (not corporate) benefit.¹

§ 765. Not only is the distinction just mentioned well established, but, as practically applied in the reported judgments of the courts, it has tended to promote justice and to secure individual rights. This liability on the part of municipal corporations springs, as we think, from the particular *nature of the duty* enjoined, which must relate to the local or special interests of the municipality, and be imperative, and not discretionary or judicial, and from the *means given* for its performance, which must be ample or such as were considered to be so by the legislature, and not from the supposed circumstance that they received and accepted their charters or grants of powers or franchises *upon an implied*

¹ See cases cited *ante*, sec. 39; *supra*, secs. 755, 758, 761-768; *infra*, secs. 772-778, 786, 789, 802. See, also, *Oliver v. Worcester*, 102 Mass. 489, 499, 1869; *Richmond v. Long's Administrators*, 17 Gratt. (Va.) 375, 1867; *Western Savings Fund Society v. Philadelphia*, 31 Pa. St. 175, 189, *per Strong, J.* These cases all refer to the case of *Bailey v. Mayor, &c. of New York*, 3 Hill, 531, and to the distinction taken by *Nelson, C. J.*, between the public and private capacity of municipal corporations. See, also, *Crossett v. Janesville*, 28 Wis. 420, 1871.

Municipal corporations are liable to the patentee of an invention if they infringe his invention in the course of the execution of corporate powers and duties. *Ransom v. New York* (infringing patent for fire engines), 1 Fisher Pat. Cas. 254, 274, 1856; *Bliss v. Brooklyn*, 4 Fisher Pat. Cas. 596, 1871. In this case the city was held liable to the patentee for an improvement in *hose couplings* used by it without his authority. See, also, *Am. Nich. Pav. Co. v. Elizabeth City*, 4 Fisher Pat. Cas. 189, 197, *per Strong, J.*; *Allen v. Brooklyn*, *Id.* 598. But in *Ohio* it was decided by Mr. District Judge *Leavitt* in *Jacobs v. Hamilton County*, 4 Fisher Pat. Cas. 81, 1862, following *Hamilton Co. v. Mighels* (cited *ante*, sec. 10, note), that a county was not liable to the patentee for an infringement of his patent in the construction of a county jail.

A city corporation is *not liable for an infringement where the work was done by contractors* and the patentee or his exclusive licensee had authorized such contractors to proceed to execute their contract with the city; and it was held that the owner of the patent could not authorize the contractors to use the patented article or process, and reserve the right to proceed against the city to recover damages for an infringement of the patent thus occurring. *Bigelow v. Louisville* (U. S. Cir. Court, 1869, before *Ballard, J.*), 3 Fisher Pat. Cases, 602. *Ante*, secs. 389, 390.

contract with the state that they would discharge their corporate duties, and that this contract enures to the benefit of every individual interested in its performance.¹ Unlike municipal corporations created by royal charters, which cannot be imposed or altered without the consent of the corporators, except, indeed, by parliament,² our American corporations, in all their parts and functions, general and special, are mere emanations or creations of the sovereignty of the state, which confers and changes their powers at its will. There is no relation of *contract* between them and the state; and the notion that in any accurate sense the state makes a contract with a municipality, when conferring powers, either for the general or local advantage, seems to be purely ideal.³

§ 766. The rule of law is a general one, that *the superior or employer must answer civilly for the negligence or want of skill of his agent or servant* in the course or line of his employment, by which another is injured. Municipal corporations, under the conditions herein stated, fall within the operation of this rule of law, and are liable, accordingly, to civil actions for damages when the requisite elements of liability co-exist. To create such a liability, it is fundamentally necessary that the act done which is injurious to others must be *within* the scope of the corporate powers as prescribed by charter or positive enactment (the extent of which powers all persons are bound, at their peril, to know); in other words, it must not be *ultra vires* in the sense that it is not *within* the power or authority of the corporation to act in reference to it under any circumstances.⁴ If the act complained of lies *wholly outside of*

¹ This is the *rationale* of the doctrine of the cases, as stated by *Selden*, J., in *Weet v. Brockport*, 16 N. Y. 161, 173, note, and it is the one adopted by Mr. Justice *Cooley* in his work on Constitutional Limitations, 247, 248, and in many reported cases. Its soundness is ably combatted by Mr. Justice *Campbell*, in *Detroit v. Blakeby*, 9 Am. Law Reg. (N. S.) 670; S. C., 21 Mich. 84.

² *Ante*, sec. 15.

³ *Ante*, secs. 17, 23, 29, 30, 39.

⁴ *Ante* secs. 381, 749, 755; *post*, sec. 766; *Broom Com. Com. Law*, 560.

the general or special powers of the corporation as conferred in its charter or by statute, the corporation can in no event be liable, whether it directly commanded the performance of the act or whether it be done by its officers without its express command ; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action.¹ But if the wrongful act be not in this sense *ultra vires*, it may be the foundation of an action of tort against the corporation, either when it was done by its officers under its previous direct authority, or has been ratified or adopted, expressly or impliedly, by it, or when it was done by the officers, agents, or servants of the corporation, in the execution of *corporate powers* or the performance of *corporate duties* of a ministerial nature, and was done so negligently or unskillfully as to injure others, in which case the corporation is liable for the carelessness or want of skill of its officers or immediate servants or agents in the course of their authorized employment, without express adoption or ratifying act. Such are the general principles of law, concerning which there is no disagreement ;² but when we come to their application, considerable difference of opinion will be found as to what acts are, and what are not, *ultra vires*, and what powers and duties are, within the meaning of the rule, as stated, *corporate powers* and duties ; for if the duty, though devolved by law upon an officer elected or appointed by the corporation, is not a *corporate duty*, the officers of the corporation, in performing it, do not act for the corporation, and hence the corporation is not responsible (unless expressly declared to be by statute) for the omission to perform it or for the manner in which it is performed.³

¹ *Id.* As to implied liability, see *ante*, secs. 383-387, 750.

² Secs. 769, 772-778, 781, 789, 800-802. See, also, *Thayer v. Boston*, 19 Pick. 511, 1837, where the subject of the *liability* of a municipal corporation for the unauthorized acts of its officers is discussed by Shaw, C. J. ; *Anthony v. Adams*, 1 Met. (Mass.) 284, 1840 ; *Baker v. Boston*, 12 Pick. 84 ; *Perley v. Georgetown*, 7 Gray, 464, 1856 ; *Howell v. Buffalo*, 15 N. Y. 512, 1857 ; *Baltimore v. Mechbach*, 18 Md. 276 ; *State v. Kirkley*, 29 Md. 85, 110, 1868 ; *Harvey v. Rochester*, 35 Barb. 177, 1861 ; *Leman v. Mayor, &c.*, of New York, 5 Bosw. 414 ; *Railroad Company v. Quigley* (private corporation held responsible for libel), 21 How. 202, 1858.

³ *Supra*, secs. 755, 758, 763 ; *infra*, secs. 772-778, 800-802.

§ 767. These general principles may be illustrated and enforced by a reference to some of the adjudicated cases; and first, the proposition that there can be *no corporate liability when the act complained of is one not authorized by the charter*, or constituent act of the corporation, or some valid legislative enactment applicable to it. We have heretofore seen that contracts *ultra vires* in the sense just explained, impose no corporate liability,¹ and for the same reasons, the doctrine applies to *acts* other than contracts, whether performed by the municipal council, or under its direction, or by officers in the execution of their supposed powers or duties. The principle that a municipal corporation is bound by the acts of its officers only when within the charter or scope of their powers, and that acts outside of the powers of the corporation, or of the officers appointed to act for it, are void as respects the corporation, is vital; and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts. The principle just mentioned is exemplified in an interesting manner, in a case² where the authorities of the city of Albany assumed to build a private bridge across the basin to a pier in the Hudson river. The only authority for the performance of the work was an *unconstitutional statute*. The bridge fell, in consequence solely of the negligent and

¹ *Ante*, secs. 381, 749, 755, 766.

² *Mayor, &c., of Albany v. Cunliff*, 2 Comst. 165, 1849, reversing S. C., 2 Barb. 190.

A case in Illinois may here appropriately be noticed, which, in connection with the one just stated, will illustrate the *principle* on which the liability of the corporation depends. By statute, a city was authorized "to construct an *embankment and plank road*" across a certain bottom, and under this authority constructed a *pile bridge* across the bottom in so careless a manner that the horse of plaintiff, when rightfully upon the way, fell through and was killed. When sued for this injury, the defence of the city was, that it was only authorized to build an embankment and plank road, and that in building the pile bridge it *exceeded its authority*, and hence it is not the act of the city, but only of its officers, and therefore the city is not responsible for the injury. But the court held, inasmuch as the city was authorized to construct a road at the place where it constructed this road, that its failure to construct it in the designated mode but made its liability the more plain, distinguishing the case from one where the officers of the city should, *without authority*, construct such a work in another jurisdiction. *Pekin v. Newell*, 26 Ill. 320, 1861.

improper manner in which it had been constructed by the city. It was decided by the Court of Appeals, reversing the judgment of the Supreme Court, that the corporation was not liable to an action for damages at the suit of a person injured by the accident.

§ 768. So, upon the same principle, where the *selectmen of a town caused a dam to be erected* (an act the town was not authorized by law to do) which flooded the plaintiff's land, the town was held not liable for the injuries resulting therefrom.¹ So a city corporation has no legal power to call a *meeting of the citizens to consider political or philanthropic purposes*; and if it does so even by ordinance of its common council, and a person at a meeting thus assembled is injured by the discharge of a cannon fired by persons present, the corporation is not liable.² So, in another case, the incorporating act *prohibited the trustees of a village corporation from laying out any street* so as to run over the site of any building the expense of removing which should exceed one hundred dollars. The object of this prohibition was considered to be to protect the taxpayers, as well as for the benefit of the owners of buildings. The trustees, exceeding their powers, laid out a street in the site of which there was a building, the expense of moving which would exceed the sum named. In an action brought against the corporation by the land owner whose property was taken for the street, it was decided by the Supreme Court of New York that the whole proceeding was a nullity, and that the corporation was not estopped to set up the want of jurisdiction in defence, notwithstanding the property of the plaintiff had actually been taken.³

¹ *Anthony v. Adams*, 1 Met. (Mass.) 284, 1840. Approved, *Walling v. Shreveport*, 5 La. An. 660, 1850. *Infra*, sec. 797.

² *Boyland v. Mayor, &c.*, of New York, 1 Sandf. (S. C. R.) 27, 1847. Same principle, *Boom v. Utica*, 2 Barb. 104 (trespass by agent where corporation had no power involves no corporate liability). *Cuyler v. Rochester*, 12 Wend. 165; *Swift v. Williamsburg*, 24 Barb. 427; *Starr v. Rochester*, 6 Wend. 564; *Morrison v. Lawrence* (injury by city fireworks), 98 Mass. 219, 1867.

³ *Cuyler v. Rochester*, 12 Wend. 165, 1834.

That acts, ultra vires, though done colore officii, impose no corporate liability: See *Baltimore v. Eschbach*, 18 Md. 276; *Id.* 284; *State v. Kirkley*,

§ 769. Cases such as those just mentioned are to be *distinguished from others* which resemble them in the circumstance of relating to illegal acts, but which arise out of matters or transactions *within the general powers* of the corporation, and in respect of which there may be a corporate liability. Thus, if in exercising its power to open or improve streets, the agents or officers of a municipal corporation, under its authority or direction, *commit a trespass upon, or take possession of, private property*, without complying with the charter or statute, the corporation is liable in damages therefor.¹ In such cases, also, an action will lie against a city corporation by the owner of land through which its agents have unlawfully made a sewer,² or for trees destroyed and injuries done by them.³ A case in Louisiana, which was several times before the courts in that state, was decided upon the same principle. The mayor of a city tortiously, and in defiance of an injunction, proceeded at the head of a force of laborers and demolished a portion of the plaintiff's house, for the supposed reason that it was on

29 Md. 85, 111, 1868; *Horn v. Baltimore*, 30 Md. 218, 1868, approving, *Howell v. Buffalo*, 15 N. Y. 512; *Cole v. Nashville*, 4 Sneed (Tenn.) 162, 1856, cited *ante*, sec. 755, note; *Mitchell v. Rockland*, 52 Maine, 118, reaffirming S. C., 45 *Id.* 496; 41 *Id.* 363, where the health officers of a town, without authority of law, took possession of the plaintiff's vessel, and in the process of fumigation, set it on fire, and the town was held not liable.

¹ *Hildreth v. Lowell*, 11 Gray, 345, 1858, approving *Thayer v. Boston*, 19 Pick. 516, 1837; *Soulard v. St. Louis*, 36 Mo. 546, 1865; *Walling v. Shreveport*, 5 La. An. 660, 1850; *Allen v. Decatur* (trespass) 24 Ill. 332, 1860; *Lee v. Sandy Hill*, 40 New York, 442, 1869, where a corporate liability was asserted for the *torts of the highway officers* in encroaching upon the plaintiff's property by direction of the governing body of the corporation, under the erroneous supposition that it was part of the street. *Mason, J.*, approves of the rule as stated by *Shaw, C. J.*, in *Thayer v. Boston*, *supra*. *S. P. Sheldon v. Kalamazoo*, 24 Mich. 383, 1872, in which the corporation was held liable for a tort committed by direction of its council upon private property; *Crossett v. Janesville*, 28 Wis. 420, 1871. *Infra*, secs. 771, 772.

In *Soulard v. St. Louis*, *supra*, where a street was opened upon land without condemnation, the court held that an action might be maintained by the owner, that he might recover as damages the value of the land appropriated, which, when paid, would, the court was inclined to think, work, *ipso facto*, a dedication thereof to the city. *Ante*, sec. 479.

² *Hildreth v. Lowell*, 11 Gray, 345, 1858.

³ *Walling v. Shreveport*, 5 La. An. 660, 1850.

public ground. The city corporation ratified the act by defending it. On the first appeal the court doubted whether the corporation could be made liable for the wrongful acts charged against its officers, especially as these were alleged to have been done by them willfully and maliciously. On the second appeal it was held, that although the acts of the mayor were done without the previous order of the city council, yet the corporation, by reason of its subsequent ratification, was liable, and the plaintiff recovered.'

§ 770. *Prima facie*, a municipal corporation is not liable for the trespass and wrongful acts of its officers, though done *colore officii*; but it will clearly be liable therefor where the act, if not wholly *ultra vires*, was expressly authorized by the governing body of the corporation, or where, without special authority, it was done by its officers in the scope of their duties and employment, and has been ratified by the corporation.* Accordingly, a municipal corporation is not liable for the illegal seizure of the plaintiff's property by one of its officers, for an alleged violation of its ordinances, when, in fact, no such violation took place, and the corporation had not previously authorized the act, or subsequently ratified it by receiving the proceeds of the sale of the property seized, or in some other manner.* If, however, the corporation, by its authorized action, *adopts the illegal acts* of its officers, done in the line of official duty, it will be liable therefor, however it might be in the absence of such ratification. Therefore, where the officers of a city

* *McGary v. Lafayette*, 12 Rob. (La.) 668. On re-hearing, *Id.* 674. S. C., again, 4 La. An. 440, 1849. Approved, *Wilde v. New Orleans*, 12 La. An. 15, 1857. See, also, *Lee v. Sandy Hill*, *supra*, sec. 769, note. *Ante*, secs. 98, 372, note.

* *Thayer v. Boston*, 19 Pick. 511, 516, 1837, where the rule, as stated by *Shaw*, C. J., makes the corporation, without ratification, liable, also, for the acts of its officers "done *bona fide*, in pursuance of a general authority to act for the city on the subject to which they relate." Approved by *Mason*, J.; *Lee v. Sandy Hill*, 40 N. Y. 442, 449, 1869; compare, *Perley v. Georgetown*, 7 Gray, 464, 1856, cited *infra*, and statement of rule by *Metcalf*, J.; *Moore v. Railroad Company*, 4 Gray, 465, 467, 1855; *Howell v. Buffalo*, 15 N. Y. 512, 519, note remarks of *Denio*, C. J., p. 521. *Supra*, sec. 768, and note; *Angell & Ames*, sec. 311.

* *Fox v. Northern Liberties*, 3 Watts & Serg. 103, 1841. *Infra*, sec. 773.

illegally seized the personal property of the plaintiff, and detained it, and the plaintiff brought suit against the city to recover the property, and the city filed an answer which involved a ratification of the acts of the officers in question, and an admission that they were the acts of the city, and the city was defeated in the suit, it was held liable for the damage done to the plaintiff by the illegal seizure and detention of his property.¹ On the principle that a town is not liable for the trespasses or illegal acts of its officers or agents, unless such acts were done under its authority previously conferred, or have subsequently been ratified by it, it was held in Massachusetts, that if a *town collector*, without being authorized, commits a person to prison for not paying a tax, since abated, though illegally included in his warrant, the town is not responsible, in an action of tort, for false imprisonment.²

§ 771. A municipal corporation *may be liable as respects illegal and void acts*, where these are within the scope of the general powers of the corporation, and where the enforcement of such acts by its officers under its au

¹ *Wilde v. New Orleans*, 12 La. An. 15, 1857; following, *McGary v. Lafayette*, 4 Ib. 440; *Johnson v. Municipality*, 5 Ib. 100. In another case in the same state it was held that though property be, in the first instance, lawfully seized for the violation of an ordinance, yet if the corporate authorities *fail to pursue the requisite steps* in advertising and disposing of the property seized, the act of seizure by the officer becomes a *trespass ab initio*, for which the corporation, it was decided, might be liable to restore the property or pay its value. *Baumgard v. Mayor, &c.*, 9 La. An. 119, 1835.

² *Perley v. Georgetown*, 7 Gray, 464, 1856. Afterwards paying the collector's fees for serving the warrant, and the jailer's charges, were held not to ratify the arrest, it not appearing that they were so intended. In New York, see *Lorillard v. Monroe*, 11 N. Y. (1 Kern.) 392, 1854; *Bank v. Mayor, &c.*, 43 N. Y. 184. But the *treasurer of a town corporation* is clearly its officer and agent, for whose acts, within the scope of his power, it is liable. *Tucker v. Rochester*, 7 Wend. 254; cited 2 Denio, 473, and see cases there referred to. But it is not liable for money placed in his hands by individuals or received by him other than in the line of his official duties. *Tolman v. Marlborough*, 3 N. H. 57, 59.

The previous personal and unauthorized act of a public officer will not estop him from acting in his public capacity as he may deem the public good to require. *Day v. Green*, 4 Cush. 433, 1849; *Dill v. Wareham*, 7 Met. 433, 1844.

thority has been compulsory, resulting in injury to individuals. Falling within this principle is the liability of the corporation to refund void taxes and assessments compulsorily collected for its own benefit.¹ So where a municipal corporation made a *void assessment* upon the plaintiff for a street improvement, and its officers seized his property (bank bills) to pay it, the majority of the Court of Appeals of New York held, and we think properly, that since the assessment was made for a purpose within the general powers of the corporation (though the particular assessment was illegal) the corporation was liable to the plaintiff in a common law action for the trespass committed by its officers in seizing his property.²

§ 772. It may be observed, in the next place, that when it is sought to render a municipal corporation liable for the *act of servants or agents*, a cardinal inquiry is, *whether they are the servants or agents of the corporation*. If the corporation appoints or elects them, and can control them in the discharge of their duties; can continue or remove them; can hold them responsible for the manner in which they discharge their trust; and if those duties relate to the exercise of *corporate* powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and *the maxim of respondeat superior applies*. But if, on the other hand, they are elected or appointed by the corporation in obedience to the statute, to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the government, if they are inde-

¹ *Supra*, sec. 750, and cases cited.

² *Howell v. Buffalo*, 15 N. Y. 512, 1857; *Denio*, C. J., and *Bowen*, J., dissented. The chief judge, in his dissenting opinion, expressed his inability to see how the assessment could be *void*, and yet be a corporate act and impose a corporate liability. The majority opinion can, we think, be sustained on the principle stated in the text. *Bennett v. Buffalo*, 17 N. Y. 383, 386 corrects the report of *Howell v. Buffalo*, so as to show that *Comstock*, J. agreed with the majority of the court as to the liability of the corporation *Bank, &c. v. Mayor, &c.*, 43 N. Y. 184; *Williams v. Dunkirk* (tort of village trustees), 3 *Lansing* (N. Y.) 44, 1870.

pendent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the statute confers upon them, and *the doctrine of respondeat superior is not applicable.*¹ It will thus be seen that, on general principles, it is necessary, in order to make a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrongful act or neglect of an officer, that it be shown that the officer was *its* officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and, also, that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation.'

¹ *The Mayor, &c. v. Bailey* (Croton Dam Case), 2 Denio, 438, 447, 1845, and authorities cited by Hand, Senator. *Infra*, sec. 779; *Walcott v. Swampscott* (surveyor of highways), 1 Allen (Mass.) 101, 1861, *per Bigelow*, C. J.; *infra*, sec. 777; *White v. Phillipston*, 10 Met. 108; *Hafford v. New Bedford*, 16 Gray, 297, 1860; *infra*, sec. 774; *Griggs v. Foote*, 4 Allen, 195, 197; *Buttrick v. Lowell* (assault by police officer), 1 Allen, 172, 1861; *infra*, sec. 778; *Kimball v. Boston*, 1 Allen, 417; *Child v. Boston* (sewers), 4 Allen, 41, 52, 1862; *Morrison v. Lawrence*, 98 Mass. 219, 1867; *infra*, sec. 802; *supra*, secs. 758, 762; *Ogg v. Lansing*, Iowa Sup. Ct. Dec. T. 1872; *Bunkmeyer v. Evansville*, 29 Ind. 187.

Thus, in New York, the mayor and aldermen, in making an order for the destruction of a building pursuant to the statute (2 R. L. 1831, p. 368, sec. 81), were considered to act *not as the officers or agents of the company, but as magistrates or public officers*, designated by their official names by the legislature for the execution of a public duty. *Russell v. Mayor, &c. of New York*, 2 Denio, 461, opinion of Sherman, Senator, at p. 478, and of Porter, Senator, at p. 481. The case was distinguished from that of *Bailey v. The Mayor, &c. of New York*, 2 Denio, 443; affirming S. C., 3 Hill, 531, in relation to the Croton aqueduct, where, on the ground that the corporation had an interest in the grant, held property under it, and passed ordinances in relation to the execution of the work, it was held liable for the acts and neglect of the *water commissioners* in relation to the work, though they were appointed by the governor and the senate; *supra*, secs. 757, 758; *infra*, sec. 779.

As to the personal liability of public officers or agents created by statute, for official acts and neglect, see *Nowell v. Wright*, 3 Allen (Mass.) 166, and cases cited. *Ante*, sec. 176, and note, secs. 691, 780, n.

¹ Same authorities. *Infra*, secs. 773-778. *Respondeat superior. Corpo-*

§ 773. Agreeably to the principles just mentioned, *police officers appointed by a city are not its agents or servants*, so as to render it responsible for their unlawful or negligent acts in the discharge of their duties; and, accordingly, a city is not liable for an *assault and battery*, committed by its police officers, though done in an attempt to enforce an ordinance of the city; nor for an *arrest* made by them which is illegal for want of a warrant; nor for their *unlawful acts of violence*, whereby, in the exercise of their duty of suppressing an unlawful assemblage of slaves, the plaintiff's slave was killed.* So, on the same, principle,

rations—when liable and when not, for the torts of their officers. *Hilsdorf v. St. Louis*, 45 Mo. 94; *Lyman v. Bridge Company*, 2 Aiken, (Vt.) 255, 1827; *Hinde v. Navigation Company*, 15 Ill. 78; *Morrison v. Lawrence*, 98 Mass. 219; *Fisher v. Boston*, 104 Mass. 87, 1870; *Stewart v. New Orleans*, 9 La. An. 461; *Bennett v. New Orleans*, 14 La. An. 120, 1849; *Mitchell v. Rockland*, 52 Me. 118; *Small v. Danville*, 51 Me. 359; distinguished from *Thayer v. Boston*, 19 Pick. 511; *Alcorn v. Philadelphia* (city surveyor), 44 Pa. St. 348, 1863; *Reilly v. Philadelphia* (when contractor for local improvement is the agent of the city) 60 Pa. St. 467; *Hilliard v. Richardson*, 3 Gray (Mass.) 349; approved and distinguished in *Chicago v. Robbins*, 2 Black (U. S.) 418, 428; *Ready v. Mayor, &c.* (acts of city marshal), 6 Ala. 327, 1844; *Cowley v. Sunderland* (mayor of), 6 H. & N. 565; *Hewison v. New Haven*, 37 Conn. 475, 1871; *Sheldon v. Kalamazoo*, 24 Mich. 383.

Where the mayor of a city in excess of his powers made an arrangement with a person to remove carcasses, and that person threw them into the river, and thereby injured the plaintiff's property it was held that the city was not liable, since the mayor was not in this matter the servant or agent of the city, and the principle of *respondet superior* did not apply.

* *Buttrick v. Lowell*, 1 Allen, 172, 1861; *Kimball v. Boston*, *Id.* 417, *ante*, sec. 33; sec. 34; sec. 385; *supra*, sec. 770. See, also, *Atwater v. Baltimore*, 31 Md. 462, 1869, in which it was held that the city was not liable for the neglect of the board of police commissioners, who are not appointed by, or responsible to the corporation; distinguished from *Marriott v. Baltimore*, 9 Md. 160; *Elliott v. Philadelphia*, 7 Phil. 128, 1869.

* *Pesterfield v. Vickers*, 3 Coldw. (Tenn.) 205, 1866, approving *Buttrick v. Lowell*, *supra*. Nor for the act of the recorder in *wrongfully refusing bail*, the remedy in such cases must be sought against the officers personally. *Id.*, *Ready v. Mayor, &c.* (city marshal), 6 Ala. 327, 1844.

* *Stewart v. New Orleans*, 9 La. An. 461, 1854. S. P. in similar action, *Dargan v. Mobile* (slave negligently killed by an officer of the city guard in attempting to arrest him for a breach of its ordinances—city held not liable), 31 Ala. 469, 1858. The opinion of *Walker, J.*, is well considered. Compare *Johnson v. Municipality*, 5 La. An. 100, 1850, in which the corporation

a person who suffers a personal injury *while aiding the police officers* of a city, at their request, in arresting disturbers of the public peace under a valid ordinance, has no remedy against the city.¹ The municipal corporation in all these cases represents the state or the public; the public officers are not the servants of the corporation, and hence the principle of *respondet superior* does not apply

§ 774. So, although a municipal corporation has power to extinguish fires: to establish a fire department; to appoint and remove its officers, and to make regulations in respect to their government, and the management of fires, *it is not liable for the negligence of firemen* appointed and paid by it, who, when engaged in their line of duty, upon an alarm of fire, ran over the plaintiff in drawing a hose reel belonging to the city, on their way to the fire;² nor for injuries to the plaintiff caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department.³ The exemption from liability is placed upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed by the city corporation, are not the agents and servants of the city, for whose conduct it is liable; but they act rather as officers of the city,

was held liable for the neglect of duty on the part of *the keeper of the police jail*, resulting in the death of the plaintiff's slave. The decision is upon the ground that the keeper was the agent of the corporation, and that it was liable for his acts and defaults in the discharge of his duties; but *quære*, and see comments of Walker, J., in *Dargan v. Mobile*, 81 Ala. 469, 477, 1858; *Richmond v. Long's Administrators*, 17 Gratt. (Va.) 375, 1867, approving *Stewart v. New Orleans*, and *Dargan v. Mobile*, above cited. *Ante*, sec. 34.

Liability of city for *loss of slave* put to work in *city chain gang*. *Clague v. New Orleans*, 18 La. An. 275.

¹ *Cobb v. Portland*, 55 Maine, 381, 1868; *Sutton v. Board of Police*, 41 Miss. 236.

² *Hafford v. New Bedford*, 16 Gray (Mass.) 297, 1860. *Ante*, secs. 33, 34.

³ *Fisher v. Boston*, 104 Mass. 87, 1860; distinguished from *Oliver v. Worcester*, 103 Mass. 489.

charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given; and the maxim of *respondeat superior* has, therefore, no application.¹ Nor is such a corporation liable to the owner of property destroyed or damaged by fire, in consequence of its *neglect to provide suitable engines* or fire apparatus, or to provide and keep in repair public cisterns.² A liability on the part of the corporation was sought to be sustained, upon the ground of the neglect of a *corporate duty*, but the court considered that powers of this nature conferred upon municipal corporations were legislative and governmental, and excluded the notion of responsibility to individuals based on neglect or nonfeasance, and distinguished the case from those in which the duty is purely ministerial.

§ 775. So where a city, under its charter and the general law of the state enacted to prevent the spread of contagious diseases, establishes a hospital, it is not responsible to persons injured by reason of the misconduct of its agents and employes therein; and, accordingly, the city of Richmond was held *not to be liable for the loss of a slave admitted to the hospital of the corporation to be treated for the small-pox, and whom the servants of the city in charge of the hospital negligently suffered, when delirious, to escape, wander off, and die.*³

¹ *Per Bigelow, C. J., in Hafford v. New Bedford, supra. Supra, sec. 758.*

² *Wheeler v. Cincinnati*, 19 Ohio St. 19, 1869. *S. P. Patch v. Covington*, 17 B. Mon. 722, 1856; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Weightman v. Washington*, 1 Black, 39, 49; *Torbush v. Norwich*, 38 Conn. 225, 1871; *Grant v. Erie*, 69 Pa. St. 420, 1871; *Jewett v. New Haven*, 38 Conn. 368. *Supra, sec. 758.*

³ *Richmond v. Long's Administrators*, 17 Gratt. 375, 1867; approves *Dargan v. Mobile*, 31 Ala. 469; *Stewart v. New Orleans*, 9 La. An. 461; and goes on the ground that the duty here was public, and not private, and hence the city not liable for acts and defaults of its officers; and itself approved and followed in a similar case in Missouri. *Murtaugh v. St. Louis*, 44 Mo. 479, 1869, in which it was held that the city was not liable to a non paying patient in its hospital for injuries caused by the *neglect or misconduct of the hospital officers or servants*. *Sherbourne v. Yuba County*, 21 Cal. 113, 1862 holding that a county was not liable in damages to an inmate of its hospital

§ 776. A municipal corporation is not responsible for the mistake or the want of care or skill of the *city surveyor or engineer*, whether appointed and removable by it or elected by the people, when he performs duties (though the performance thereof be regulated by ordinance) for or between *private individuals*—as for example, fixing the boundary between their lots.¹ In such case, the principle of *respondeat superior* does not apply, as it does or may when this officer acts for the corporation, or under its direction, in making *corporate improvements*.²

§ 777. On the same principle, treating *surveyors of highways* elected by the town as public, rather than municipal, officers, a New England town is not liable for an injury sustained by a person by reason of the negligence of a laborer in the course of his employment by the highway surveyor to aid him in the discharge of his official duty.

for unskillful treatment of the *resident physician*. In *Ogg v. Lansing*, decided by the Supreme Court of Iowa, at the December Term, 1872, on the principle that in discharging its legislative functions a city is not liable for defective execution of its ordinances nor for the neglect or nonfeasance of its officers and agents, it was held that a city corporation was not liable to a civil action by a person injured by reason of its neglect to take proper precautions to prevent the spread of the *small-pox*, nor for the failure of its officers to notify the plaintiff, who was requested by them to assist in removing the corpse of a person who had died of this disease, of the dangerous nature of the service required of him. *Powers in respect to health. Ante*, secs. 95, 303–305. Liability for acts of *health officers*, see *ante*, sec. 305, note; *Rudolphe v. New Orleans*, 11 La. An. 242, which was action for damages for alleged illegal order of board of health in ordering a ship to leave the city; *Mitchell v. Rockland* (illegal taking possession of a vessel), 41 Maine, 363; S. C., 45 Maine, 496, 1858; re-affirmed, 52 Maine, 118; *Harrison v. Baltimore*, 1 Gill (Md.) 264, 1843, cited *ante*, sec. 95.

¹ *Alcorn v. Philadelphia* 44 Pa. St. 348, 1863. *Thompson, J.*, considered it as a case of first impression, and distinguished it from those asserting corporate liability for defective streets. *Erie v. Schwingle*, 22 Pa. St. 384, 1853; *Dean v. Milford Township*, 5 Watts & Serg. 545; *Dayton v. Pease*, 4 Ohio St. 80, 100, 1854, *per Ranney, J.*, and see *Ib.* 416; *McCarty v. Bauer*, 3 Kansas, 237, 1865 (personal action against engineer for erroneous survey). *When personally liable. Ib.* *Ante*, sec. 176, n.

² *Dayton v. Pease*, 4 Ohio St. 80, 1854, where the city was held liable for injuries caused by the fall of a bridge, owing to the negligence and want of skill of the city engineer; *McCarty v. Bauer, supra*; *Rochester White Lead Company v. Rochester*, 3 Comst. (N. Y.) 469, 1850. *Supra*, sec. 789.

Nor is it liable for damages occasioned by *the wrongful acts of the surveyor himself* in performing his official duties.¹ But it would be otherwise where the working and repair of streets is treated (as in many of the states it is) as a municipal duty, and the officer in charge as a corporate, in distinction from an independent public officer, or where the injury was negligently caused by such officer in the process of executing upon the streets an authorized *corporate* improvement or work, for then the doctrine of *respondeat superior* would apply.²

¹ *Walcott v. Swampscott*, 1 Allen, 101, 1861; *Barny v. Lowell*, 98 Mass. 570; *supra*, sec. 769, note; *Judge v. Meriden*, 38 Conn. 90, 1871. Compare *Foreman v. Canterbury*, Law Rep. 6 Q. B. 214. Limited powers of New England town: *Ante*, secs. 11, 12; *supra*, sec. 763, note. And the surveyor himself is only liable in damages for wanton malicious or improper acts in making or repairing the highways in his district. *Rowe v. Addison*, 34 N. H. 306, 312, and cases cited. *Ante*, 176, note, and cases.

Constables, though appointed by the town, are not its agents or servants, and the town is not liable for their default, the statute not having so provided. *Hurlburt v. Litchfield*, 1 Root (Conn.) 520, 1793.

And so, in New York, *town assessors and collectors of taxes are independent public officers*, and not the agents or servants of the towns in their corporate capacity. *Lorillard v. Monroe*, 11 N. Y. 392, 1854. See *Bank v. Mayor*, 43 N. Y. 184.

In Vermont, towns are made liable by statute for "default" or "neglect" of *town clerks* in respect to *official* duties. *Hunter v. Winsor* ("index" or "alphabet" book), 24 Vt. 327; *Ib.* 338, 580. *What are official acts or defaults.* *Lyman v. Edgerton*, 29 Vt. 305; *Jarvis v. Barnard*, 30 Vt. 492.

² *Infra*, secs. 789, 790, 802; *Rochester White Lead Company v. Rochester*, 3 N. Y. (3 Comst.) 463; *Eastman v. Meredith*, 36 N. H. 295, *per Perley*, C. J., *obiter*; *Baker v. Boston*, 12 Pick. 184; *Thayer v. Boston*, 19 Pick. 511, 516, 1837. *Supra*, secs. 770, 769, note. In *Scott v. Mayor, &c.*, of Manchester, 37 Eng. Law & Eq. 495, 1856 (S. C., 1 H. & N. 59), by the negligence of workmen employed by the city in laying its own gas pipes in the streets, the plaintiff's eye was injured, and the city held liable on the principle of *respondeat superior*. Affirmed on appeal, 2 H. & N. 204. Same principle, *Foreman v. Canterbury*, Law Rep. 6 Q. B. 214, 1871. So, in *Delmonico v. Mayor, &c.*, of New York, 1 Sandf. (S. C. R.) 222, 1848, the plaintiff recovered for damages occasioned by the negligence of the defendants in constructing a sewer. There was a recovery against the city in *Lloyd v. Mayor, &c.*, of New York, 1 Seld. 369, 1851, for the negligence of persons employed by the proper officers of a corporation in leaving a dangerous hole in the street over night, in the process of repairing the public sewers. *Infra*, secs. 801, 802, as to sewers; *supra*, sec. 753. The adjudged cases differ, as elsewhere shown, as to what are public, and what corporate, un-

§ 778. The doctrine may be considered as established, that *where a duty is a corporate one*, that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency. *and is absolute and perfect*, and not discretionary or judicial in its nature, *and is one owing to the plaintiff*, or in the performance of which he is specially interested, that *the corporation is liable in a civil action* for the damages resulting to individuals by its neglect to perform the duty, or for the want of proper care or want of reasonable skill of its officers or servants acting under its direction or authority in the execution of such a duty; and with the qualifications stated, it is liable, on the same principles, and to the same extent, as an individual or private corporation would be under like circumstances.¹ For illustration, if a city neglects its ministerial duty to cause its sewers to be kept free from obstructions, to the injury of a person who has an interest in the performance of

dertakings; but the *principle* on which the liability turns is the one stated in the text.

¹ Lloyd v. Mayor, &c., of New York, 1 Seld. 369, 1831; McCullough v. Mayor, &c. of Brooklyn, 23 Wend. 458, 1840; Clayburg v. Chicago (refusal to collect assessment), 25 Ill. 535, 1861; Sterrett v. Houston, 14 Texas, 153, 1855. But was the duty here a corporate one? McLaughlin v. Municipality, 5 La. An. 504, 1850; Walling v. Mayor, &c., *Id.* 660; Richmond v. Long, 17 Gratt. 375, 1867; Sawyer v. Corse, 17 Gratt. (Va.) 230; Lacour v. Mayor, &c., of New York, 3 Duer, 406; Conrad v. Ithaca, 16 N. Y. 158, 1857; Barton v. Syracuse, 36 N. Y. 54. *Supra*, sec. 753. *Infra*, secs. 900-802. The rule stated in the text should not, perhaps, be extended to a case where the effect of a recovery would be to charge the corporate treasury with a burden which does not belong to it, and where the person injured by the neglect to perform the duty can compel an execution of it by *mandamus* to the proper officers of the corporation. McCullough v. Brooklyn, *supra*. *Ante*, sec. 402. *Post*, sec. 784. *When duty rests upon the corporation, and when upon its officers in their individual capacity.* *Ante*, sec. 63; Martin v. Mayor, &c. of Brooklyn, 1 Hill (N. Y.) 145. Were the trustees here, *independent* corporate officers? See Conrad v. Ithaca, 16 N. Y. 158.

It is also held in Canada that a municipal corporation may be sued for negligence in the construction of a sewer, for wrongfully obstructing a drain or watercourse, or for diverting a stream of water on the plaintiff's land. Farrell v. Mayor, &c., 12 Up. Can. Q. B. 343. Reeves v. Toronto, 21 *Id.* 157. Perdue v. The Corporation of, &c., 25 *Id.* 61. The corporation must be connected with the doing of the wrongful act. Farrell v. Mayor, &c., *infra Post*, secs. 797-802.

that duty, it is liable, as we shall see, to an action for the damages thereby occasioned.' So, if a city owns a wharf and receives wharfage or profit therefrom, it is liable for injuries caused by a failure to keep it in proper condition and repair.' So, in respect to its failure to keep its streets in a safe condition for public use, where this is a duty resting upon it.'

The liability of the corporation for its negligence, or that of its servants, is especially clear where it has received a consideration for the duty to be performed, or where, under permissive authority from the legislature, it voluntarily assumes and carries on a work or undertaking from which it receives tolls or derives a profit.'

§ 779. So the city of New York, as the owner of a dam on the Croton river, situate upon lands the *title* to which was in the city, and being part of the works built to supply the city with pure water, was, upon great consideration, held liable, though the dam was constructed at the instance and expense of the city, by *water commissioners* appointed by the *state*, and not by, or under the control of, the city authorities, to an action for injuries sustained by a third person in consequence of the dam (which was negligently and unskillfully built) being carried away by a freshet.'

¹ *Infra*, sec. 802; *Lloyd v. Mayor, &c. of New York*, 1 Seld. 369, 185¹

² *Ante*, sec. 77; *Skinkle v. Covington*, 1 Bush (Ky.) 617, 1866; *Fennimore v. New Orleans*, 20 La. An. 124. Liability for dangerous approach, see *Carleton v. Iron Company*, 99 Mass. 216. *Pittsburg v. Grier*, 22 Pa. St. 54.

³ *Infra*, sec. 789, *et seq.*

⁴ *Scott v. Manchester* (carrying on gas works), 2 Hurl. & Norm. 304, 1857, affirming S. C., 1 *Ib.* 59; *Cowley v. Sunderland* (mayor of), 6 *Ib.* 565; *Pittsburg v. Grier*, 22 Pa. St. 54, 1853; *Mersey Dock Cases*, 11 H. Lds. Cases, 687; *Henly v. Mayor, &c. of Lyme Regis*, 2 Cl. & F. 331.

⁵ *Mayor, &c. of New York v. Bailey*, in Court of Errors, 2 Denio, 433, 1845; same case, names reversed, in Supreme Court, 3 Hill (N. Y.) 531, 1842. While there was no doubt in the opinion of the Supreme Court, and comparatively little in the Court of Errors, that the city was liable, there was much diversity of opinion as to the ground of the liability. The Supreme Court (3 Hill, *supra*), makes the case turn upon the question "whether the water commissioners charged with the immediate superintendence and execution of the work stand in the relation of agents deputed

§ 780. Upon similar grounds, municipal corporations, for the improper management and use of their property,' are liable to the same extent and in the same manner as private corporations and natural persons. Unless acting under some valid special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another, or unjustly or improperly invade private

by the city to perform this duty." They hold that the city, by voluntarily accepting the benefits of the acts, by approving the plan of the commissioners, and by instructing them to proceed with the execution of the work, adopted and constituted the commissioners the *agents of the city*, and therefore, on the principle of *respondet superior*, it was liable for their neglect and want of skill in the erection of the dam. In the Court of Errors (2 Denio, above cited), Chancellor Walworth doubted this basis of the defendant's liability, and said: "It is upon the ground that the dam was the property of the city corporation, and that such corporation was legally bound to see that its corporate property was not used by any one so as to become noxious to the occupiers on the river below, that the judgment (of the Supreme Court) in the case must be sustained, if it can be sustained at all. And upon that ground, though, I confess, with some hesitation, I shall assent to the affirmance of the judgment of the court below." It was affirmed by nineteen members against four; but as the most of them delivered no opinions, the exact grounds of the affirmance cannot be known. Without doubting that Chancellor Walworth's position is sound, it seems to us clear that the view of the Supreme Court, that the water commissioners became the agents of the city by adoption, is correct. *Denio*, C. J., in *Darlington v. Mayor, &c. of New York*, 31 N. Y. 164, 200, speaking of *Bailey v. The Mayor*, says, that the Court of Errors substantially repudiated the view of the Supreme Court, which affirmed the enterprise of furnishing the city with water to be a *private* work, as distinguished from an act of municipal government, and that the city was held liable on account of its legal personality and its responsibility as such for the negligent acts of its agents and officers in the execution of their duties. *Supra*, sec. 772, note.

In *Philadelphia v. Collins*, 68 Pa. St. 106, 1871, the city was held liable in damages to the owner of a boat for *wrongfully*, during a severe drought, *withdrawing water from the Schuylkill* to supply the Fairmount Waterworks, to such an extent as to prevent boats from navigating the river.

There is *no liability* on part of the city as owner of the Croton Aqueduct for injuries from defects in the *lateral service pipes* inserted by consumers of water into the mains. *Terry v. Mayor, &c. of New York*, 8 Bosw. (N. Y.) 504. See *Cowley v. Sunderland*, 6 H. & N. 565, as to the liability of a municipal corporation for injuries caused by the unsafe condition of its property.

• See *ante*, chap. XV. on Corporate Property; *Cowley v. Sunderland* (mayor of), 6 H. & N. 565.

rights. Thus, they may erect a building for corporate purposes, but if in so doing they should place its foundations in such a manner as to cause water to flow back on private owners, the latter would have their action for the damage, the same as if the injury had been caused by an individual.¹ Similarly, a municipal corporation, *with control of a public common*, traversed by foot-paths, on which the public may rightfully travel, is liable to a common law action for damages caused by a *dangerous and unguarded excavation* made by the corporation for its own purposes, in the ground adjoining one of the paths, to a person walking thereon, and who was at the time using due care.² So, in a case in which it appeared that a city corporation was the owner of a market-house, the stalls of which it rented, but in front of which there was a pavement or open passage, which it seems was under the control of the city and not of its lessees; in the pavement there was a *dangerous hole in front of one of the stalls*, into which the plaintiff, while attending the market, fell and was injured; the court considered the market-house to be the private property of the corporation,

¹ *Eastman v. Meredith*, 36 N. H. 296, *per Perley*, C. J.; *Bailey v. Mayor, &c. of New York*, 3 Hill, 531, 541, *per Nelson*, C. J.; *Thayer v. Boston*, 19 Pick. 511; *Rhodes v. Cleveland*, 10 Ohio, 159; *Lacour v. Mayor, &c. of New York*, 3 Duer, 406, 1854; *Brower v. Mayor, &c. of New York*, 3 Barb. 254, 1848; *Treadwell v. Mayor, &c. of New York*, 1 Daly (N. Y.) 123; *Rochester White Lead Company v. Rochester*, 3 N. Y. (3 Comst.) 463; *Harper v. Milwaukee*, 30 Wis. 365, 1872. In *Weet v. Brockport*, 16 N. Y. 161, 172, Mr. Justice *Selden*, referring to *Rochester White Lead Company v. Rochester*, just cited, says: "The recovery rested upon the obvious principle that a municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual." *Post*, secs. 797-802.

Nuisances, and power of municipal corporation to prevent and abate: See *ante*, secs. 308-312; *People v. Albany*, 11 Wend. 539 (no power to destroy a work [a bulkhead] *authorized by law*, because injurious to the public health); *Hart v. Mayor, &c. of Albany*, 9 Wend. 571; affirming *S. C.*, 3 Paige, 213; *Denning v. Roome*, 6 Wend. 651; *Wetmore v. Tracy*, 14 Wend. 250; *Rochester v. Collins*, 12 Barb. 559, 1850; *Ray v. Lynes* (blacksmith shop), 10 Ala. 63, 1846.

² *Oliver v. Worcester*, 102 Mass. 489, 499, 1869. The principle is tersely stated by *Hoar*, J.: *Id.* 496; and the authorities cited by *Gray*, J.: *Id.* 499. It was considered to be an act done by the city in its *private*, as distinguished from its *public* character. *Post*, sec. 790, note; sec. 795, note.

that it was its duty to keep it in a safe condition, and that it was liable for any injury happening to individuals in consequence of its neglect to perform this duty.'

§ 781. The principle is well settled, and has, as we shall see in the course of the present chapter, very extensive application to the acts of municipal corporations, viz: that such a corporation is *not liable to an action for consequential damages* to private property or persons (unless it be given by statute) where the act complained of was done by it or its officers *under and pursuant to authority conferred by a valid act of the legislature*, and there has been no want of reasonable care or want of reasonable skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable.' This is

¹ Savannah v. Cullens, 38 Geo. 384, 1868.

² Callender v. Marsh, 1 Pick. 418, 1823; Radcliff's Executors v. Mayor, &c. of Brooklyn, 4 Comst. 195; Rounds v. Mumford, 2 Rh. Is. 154, 1852; Sprague v. Worcester, 13 Gray, 193, 1859; Bennett v. New Orleans, 14 La. An. 120, 1849; Snyder v. Rockport, 6 Ind. 237, 1855; *supra*, sec. 766; Perry v. Worcester, 6 Gray, 544; Flagg v. Worcester, 13 Gray, 601, 605, 1859, *per* Merrick, J.; The Governors, &c. v. Meredith, 4 Term R. 794; White House v. Fellowes, 10 C. B. (N. S.) 779; Mersey Docks Cases, 11 House of Lords Cases, 713, 714, 1866, *per* Blackburn, J., who, speaking of this subject, says: "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful. * * But though the legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that, in making them, no unnecessary damage shall be done." The distinction is between damage resulting from authorized works where the legislative authority is a bar to an action unless given by statute, and damage by reason of the work being negligently done, as to which the remedy of the party injured by action remains. Brine v. Railway Company, 110 Eng. Com. Law (2 Best & S.) 402, 411, 1862, *per* Crompton, J. See, also, Hicks v. Dorn, 42 N. Y. 47, 1870; *infra*, secs. 798, 800-802. *Post*, secs. 797-802.

The subject of injuries arising from the negligent execution of statutory powers is fully treated in chapter XVI. of Addison on Torts, pp. 725, 727, where the following observations of Watson, B., are quoted: "Powers given by statute are not to be used to the peril of the lives or limbs of the Queen's subjects. They are to be exercised reasonably, and with due care, so as not by negligence to cause dangers to others." Manley v. St. Helen's Canal & Rail. Co. (canal-bridge over highway), 2 H. & N. 840; Scott v. Mayor, &c. of Manchester, 2 H. & N. 204. Same principle extended to

well illustrated by an important case in Wisconsin against the city of Milwaukee, in which the plaintiff sought to recover damages sustained by reason of a *harbor improvement* made by the city under special authority from the legislature. There was no allegation that the damages were the result of negligence or want of care in making the improvement; but the recovery was sought because the effect of the improvement was to allow the waters of the lake to be driven by the wind through the canal or channel thus artificially made by the city, into and upon the lots of the plaintiff in the vicinity, causing them to be washed away and rendered insecure and unfit for use. But the court decided (applying the principle above stated) that the plaintiff's action could not be maintained.¹

§ 782. In connection with the principle that there is no implied liability for doing an act which is either directed or authorized by a valid statute, may be noticed the power of municipal corporations *to grade, and to change the established grade or level of their streets*, though the exercise of

injuries to adjoining property arising from a railroad company not using proper caution in making openings in embankment authorized by statute. *Lawrence v. Gt. North. Rail. Co.*, 16 Queen's Bench, 653; Add. on Torts, 728, and cases cited. See, further, *post*, secs. 797 *et seq.* 800-802.

Where a municipal corporation possesses the legal authority to do an act, it is immaterial to *inquire into its motives* for doing it, and erroneous to make its liability depend upon the motives with which the act was done. *Benjamin v. Wheeler*, 8 Gray, 409, 1857; *Mayor, &c. v. Randolph*, 4 Watts & Serg. (Pa.) 514, 1842 (stopping watercourse); *Chatfield v. Wilson*, 28 Vt. 49; S. C., 5 Am. Law Reg. (O. S.) 528; *infra*, sec. 783, note; *City Council v. Gilmer*, 33 Ala. 116, 1858.

¹ *Alexander v. Milwaukee*, 16 Wis. 247, 1862; cited and distinguished, *Pettigrew v. Evansville* (surface water), 25 Wis. 223. *Post*, sec. 798.

Referring to *Alexander v. Milwaukee*, *supra*, the Supreme Court of the United States observe that it has been frequently held by the Supreme Court of Wisconsin and elsewhere, that overflowing land by backing water upon it was a "taking" of private property within the meaning of the constitutional provision (*ante*, sec. 784 and note), and that "it is difficult to reconcile" *Alexander v. Milwaukee* with the decisions above referred to. *Pumpelly v. Green Bay Company*, 13 Wall. 166, 180. Undoubtedly the principle on which the court placed *Alexander v. Milwaukee* is a sound one. the only doubt in the case is whether the plaintiff's land was not "taken" in such a sense as to give him a constitutional right to compensation. See *post*, sec. 783, n.; sec. 784. and note.

the power may be injurious to the adjoining property owners. The public nature of streets; the uses to which they may lawfully be put; the authority of the legislature over them; the nature of the rights of the adjacent proprietors, of the municipality, and of the public with respect thereto; and of the delegated authority of municipal bodies or officers to improve and graduate them, are topics which have been considered in a former chapter.¹ In view of the nature of streets as there explained, and of that control over them which of right belongs to the state,² and of the nature of the ownership of lots bounded thereon, which implies subjection, if not consent, to the exercise and determination of the public will respecting what grades or changes in the grades thereof shall, from time to time, be found necessary, and what other improvements thereon or therein (within the legitimate purposes of streets³) shall be found expedient, it results, we think, that adjoining property owners are not entitled, of *legal right*, without statutory aid, to compensation for damages which result as *an incident or consequence* of the exercise of this power by the state or the municipality by delegation from the state.

§ 783. Accordingly, the courts, by numerous decisions in most of the states, have settled the doctrine that municipal corporations, acting under authority conferred by the legislature to make and repair, or to grade, level, and improve streets, if they exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, for consequential damages to his premises, unless there is a provision in the charter of the corporation, or in some statute, creating the liability. There is no such lia-

¹ Chap. XVIII. on Streets, *ante*, sec. 516, *et seq.* The power to grade is a *continuing* one. *Ante*, sec. 543. "As the duty of keeping the street in repair is a continuing one, so is the power necessary to perform it." *Per Grier, J.*; *Smith v. Washington*, 20 How. 135, 148, 1857.

"*Grading*," as applied to streets, means their "reduction to a certain degree of ascent or descent." *Ib.* *Per Grier, J.* *Ante*, secs. 542, 619, note, 636.

² *Ante*, sec. 518, *et seq.*

³ What are such purposes. *Ante*, sec. 538, *et seq.*

struction of works of a public nature therein. within the scope of the legitimate uses of streets and highways, are

majority of the court qualified the doctrine, and assumed a middle ground; namely: that if the improvement of the street is of the usual character, and the incidental damages such as ordinarily result, the law affords no remedy; but if the improvements are extraordinary, and peculiarly injurious, they can only be made on condition that the adjoining owners be compensated. This view makes the right to compensation depend, not upon the fact of injury, but the amount, and treats the improvement of the street as a *taking* of the property of the lot owner. If it is a taking, then, for *any* injury, he should be entitled to compensation. *Robertson, J.*, dissented, holding, in accordance with the prevailing doctrine elsewhere, that the city might change the grade as it should judge the public interest required, taking care to avoid all peril or inconvenience which could be avoided by a proper execution of the work, and being liable only for such loss as might be occasioned by the wanton and unskillful mode of execution. *Louisville v. Rolling Mill Company, 8 Bush (Ky.) 416, 1867.*

In *Ohio* the law as to the liability of municipal corporations has been designedly and deliberately carried beyond the limits established by the current of decisions elsewhere. They are here held liable for consequential injuries which result from the exercise of their lawful powers, though these powers be exercised judiciously, without malice, and without illegality, the court proceeding upon the ground that if an act (digging drains, as in *Rhodes v. Cincinnati, 10 Ohio, 159*, or cutting down a street, as in *McCombs v. Akron, 15 Ohio, 474; S. C., 18 Ohio, 229*), though legal, and legally executed, be done for the good of all to the injury of an individual, the injury should, in justice and good morals, be shared by all. See *Goodloe v. Cincinnati, and Smith v. Same, 4 Ohio, 500, 514*, injuries to property by grading, and consult *Crawford v. Village of Delaware, 7 Ohio St. 459, 1857; Scovil v. Giddings, 7 Ohio, part 2, page 211; Hickox v. Cleveland, 8 Ohio, 543*, which last two accord with authorities elsewhere. In *Crawford v. Delaware, supra*, the doctrine is admitted to be in "direct conflict with the decisions both in England and America," and known to be so when decided. This doctrine, says *Bronson, C. J., 4 Comst. 195, 205, supra*, is not law "beyond the state of Ohio." The later cases seem to modify the broad doctrines of the earlier ones, and make the municipal liability depend upon circumstances. *Cincinnati v. Penny, 21 Ohio St. 499, 1871*, where the prior cases are reviewed by *McIlwaine, J.* Referring to the Ohio cases, the Supreme Court of Wisconsin declare them not to be law, but observe that there "is much justice and equity in the principle they adopt." *Alexander v. Milwaukee, 16 Wis. 247, 256, 1862.*

The learned opinion of *Smith, J.*, in *Eaton v. The Railroad Company, 51 N. H. 504, 529, 1872*, reviews and criticises and classifies "the highway grade cases" and distinguishes them from each other and from the case before the court (see note to sec. 784, *infra*), and propounds the basis on which the liability or non-liability in such cases should be made to depend. It may be usefully consulted. The learned judge seems inclined

not unconstitutional, unless there be special provision to that effect, because they omit to provide compensation for those who, although their property be not *taken*, suffer

to favor views more liberal than those taken in many of the cases he refers to; but see in support of his opinion, *Pumpelly v. Green Bay Company*, 13 Wall. 166.

Municipal power to enlarge liability by ordinance in respect to damages caused by change of grade, see *Goodall v. Milwaukee*, 5 Wis. 82, 1856, but *quære*. Approved by *Paine, J.*, *Weeks v. Milwaukee*, 10 *Id.* 242, 270. See *Pearce v. Milwaukee*, 18 Wis. 32; *Goodrich v. Milwaukee*, 24 Wis. 422. *Ante*, secs. 61, 244, 251, 542.

Where the power is not exceeded, there is no liability to adjacent owner for grading the *whole width*, and so close to his line as to cause *his earth or fences and improvements to fall*, and the corporation is not bound to furnish supports or build a wall to protect it. *Taylor v. St. Louis*, 14 Mo. 20, 1851; *St. Louis v. Gurno*, 12 Mo. 414, 1849; *Rome v. Omberg*, 28 Ga. 46, 1859. In thus holding, *Lumpkin, J.*, who delivers the opinion of the court, remarks: "I confess, my convictions are not so clear as I could wish them to be." The same doctrine was, however, substantially adhered to in *Roll v. Augusta*, 34 Ga. 326. *Contra*: *Mears v. Wilmington*, 9 Ire. 78, where the general rule is recognized, but where it seems to have been held that it was the duty of the authorities "to have erected a substantial wall as the excavation proceeded, and thus preventing the caving in of the plaintiff's lot." And the substance of the reasoning of the very able judge (*Pearson, J.*), who delivered the opinion is, that it is *implied* that the corporation will do the work *properly*, and if in such a case they failed to make measures to protect the plaintiff's lot (which was improved), they failed to do the work properly, and are liable to an action; but it seems difficult, judicially, to sustain this intermediate ground, however just in its results.

Implied corporate liability recognized for *working beyond or below established grade, or without any established grade*. *Cole v. Muscatine*, 14 Iowa, 296, 299. But this was not the main question in the case. See *Crossett v. Janesville*, 28 Wis. 420, 1871; *Chambers v. Satterlee*, 40 Cal. 497, 1871; *Delphi v. Evans*, 86 Ind. 90, 1871.

Courts will not inquire whether the grade adopted be the best one, or whether one causing less damage would not equally have answered the purpose intended. *Roberts v. Chicago*, 26 Ill. 249, 1861; *Snyder v. Rockport*, 6 Ind. 237, 1855; *Reynolds v. Shreveport*, 13 La. An. 426, 1856. And the reason is, that the determination of such questions has been committed by the legislature to the governing body of the corporation, and not to the judicial tribunals.

As to wantonness, oppression, or malice in exercising the power: *Rounds v. Mumford*, 2 Rh. Is. 154, 1852; *Reynolds v. Shreveport*, *supra*; *Rudolphe v. New Orleans*, 11 La. An. 242; *Roberts v. Chicago*, 26 Ill. 249, 1861; *Mayor v. Randolph*, 4 Watts & Serg. 514, 1842. *Supra*, sec. 781, note. *Henderson v. Railway Company* (Court of Exchequer), 25 L. T. (N. S.) 881, 1871.

indirect or consequential damages. Although the adjoining property may be injured, still it is not, in a constitutional sense, *taken* for public use.¹ If, in such cases, the *statute provides a specific remedy*, or a remedy other than an ordinary civil action, that remedy alone can be pursued.²

¹ Callender v. Marsh, 1 Pick. 418, 430, 1823; Thurston v. Hancock, 12 Mass. 220. Note doubts in dissenting the opinion of Mr. Justice Story, in Charles River Bridge v. Warren Bridge, 11 Peters, 638, and note by Kent. 2 Kent Com. 840, note, 6th ed. But the doctrine in the text was asserted by the Court of Appeals, upon great consideration, in Radcliff's Executor v. Mayor, &c. of Brooklyn, 4 Comst. 195, 205, 1850. S. P. What constitutes a *taking*. *Ante*, sec. 455; Cooley Const. Lim. 541. *Legitimate use of streets*, see chapter on Streets, *ante*, sec. 588, *et seq.*

For a valuable discussion of *what constitutes a "taking" of private property*, the reader is referred to the recent case of Eaton v. The Railroad Company, 51 N. H. 504, 1872. The opinion of Smith, J., in this case cites most of the leading adjudications and attempts to classify them; and the learned judge evidently favors a less rigid view than is maintained in many of the cases. The precise point held by the court was that the legislature has no power to authorize a railroad corporation to divert the waters of a river, by cutting through, in the course of making their road bed, a natural ridge, thereby causing the waters, "sometimes in floods and freshets" to flow upon the plaintiff's land, carrying thereon sand and gravel, without making provision for his compensation. And the ground of the decision is that such an injury is a *taking* of the property within the meaning of the Constitution. 51 N. H. 504. And the same view has deliberately received the high sanction of the Supreme Court of the United States, which, after recognizing the conflict in the decisions of the state courts, held that "where the real estate is actually invaded by superinduced additions of water, earth, sand, or other materials, or by having any artificial structure placed on it, so as effectually to destroy or impair its usefulness, it is a *taking*, within the meaning of the Constitution." "This proposition" says Mr. Justice Miller, who delivered the opinion of the court, "is not in conflict with the weight of judicial authority in this country and certainly not with sound principle." Pumpelly v. Green Bay Company, 13 Wall. 168, 181, 1871. *Ante*, sec. 781.

² Hovey v. Mayo, 43 Maine, 322, 1857; Ernst v. Kunkle, 5 Ohio St. 520, 1856; Andover v. Gould, 6 Mass. 40; Boston v. Shaw, 1 Met. 130; Cole v. Muscatine, 14 Iowa, 296, 1862. *Supra*, sec. 759.

Construction of special statutes. Cole v. Muscatine (remedy in Commissioner's Court), 14 Iowa, 296, 1862; Dalzell v. Davenport (mode of estimating and proof of damages), 12 Iowa, 437; Crossett v. Janesville (requiring recommendation of property owners) 23 Wis. 434, 1871; Freeland v. Muscatine, 9 Iowa, 461. Since the decision in Callender v. Marsh, *supra*, the law as there held has been changed, and a specific remedy provided for such an injury. Ferwald v. Boston, 12 Cush. 574. This remedy excludes a civil

Accordingly, where a municipal charter provided that whenever the common council should change the grade of a street, "they should make compensation to the owners of property for actual damages thereby caused," and provide for such payment by an assessment upon all real estate benefited, and an action was brought against the city by an individual injured by a change in the grade of a street, alleging as a breach of duty that the city would not pay, or provide for the payment of the damages, it was held that he could not recover, because the effect of a recovery would be to throw the burden upon the whole city, when the law imposed it on those supposed to be locally benefited. The court regarded the case as one where the law provided a special mode of obtaining payment from a particular fund, and that the plaintiff's remedy was not by a suit for damages, but by *mandamus* to compel the council to make the assessment and collection; and the judgment of the court was, we think, correct.¹

§ 785. We come now to consider the civil liability of municipal corporations for *injuries to private persons caused by defective and unsafe streets and sidewalks*. And here it is important to attend to the different grades of corporations, and to keep in mind the distinction between municipal corporations proper and *quasi* corporations, such as counties and townships, including therein, for this purpose, the *towns* of New England. With respect to corporations of the character last mentioned, it is almost universally considered that they are not liable to a civil action for damages occasioned by defective roads and bridges under their control as public agencies, unless so declared by statute. In the United States, *there is no common law obligation* resting upon such corporations to repair highways, streets, or bridges within their limits, and they are not obliged to do so unless by force of statute. Even when the

action for all damages *necessarily* occasioned. *Flagg v. Worcester*, 13 Gray, 601, 1859. *Id.* 198; 6 Gray, 544; *Benjamin v. Wheeler*, 8 Gray, 409, 413. Statute giving damage caused by change of grade, held to extend to *property outside* of the city limits, as well as to that within the city. *Columbus v. Woolen Mills Company*, 38 Ind. 485, 1870.

¹ *Reock v. Newark*, 83 N. J. Law, 129, 1868. *Ante*, sec. 668, note; *supra*, sec. 778, note.

legislature enjoins upon corporations of this character the duty to make and repair roads, streets, and bridges, and confers the power to levy taxes therefor, the general tenor of the decisions is to treat this as a *public*, and not a *corporate* duty, and to regard these corporations, in this respect, as *public or state agencies*, and not liable to be sued civilly for damages caused by the neglect to perform this duty, unless the action be expressly given by statute.¹ As we

¹ *Ante*, secs. 761-765, and cases cited; *ante*, sec. 10a; Sutton v. Board, 41 Miss. 286, 1866; Larkin v. Saginaw County, 11 Mich. 88; Cooley v. Freeholders, 3 Dutch. (N. J.) 415, 1859, approving Freeholders v. Strader, 3 Harr. (N. J.) 108, 1840; Pray v. Jersey City, 32 N. J. Law, 394; Huffman v. San Joaquin County, 21 Cal. 426; Hedges v. Madison County, 1 Gilm. (Ill.) 567; Detroit v. Blakeby, 21 Mich. 84, *per Campbell*, C. J.; Soper v. Henry County, 26 Iowa, 264, 1868, and see cases cited in that state in which counties are held responsible for safe condition of public bridges. Granger v. Pulaski County, 26 Ark. 87, 1870.

The distinctions adverted to in the text are well illustrated by the decisions in the State of Illinois. In Hedges v. Madison County, 1 Gilm. 56, it was held that *counties were not liable* to a private action for defective highways. Subsequently it was held to be *otherwise as respects chartered cities* or ordinary municipal corporations. Browning v. Springfield, 17 Ill. 143, which case has been repeatedly followed in that state. *Post*, sec. 789, and cases cited. In Waltham v. Kemper, 55 Ill. 346, 1870, the questions arose whether *towns* in that state were under such a liability, and the court regarded them as standing on the same footing as counties, treating them as civil divisions of counties merely, and not liable to an action at common law for the neglect of officers. A statute giving the action is essential, and the court overruled the contrary holding in South Ottawa v. Foster, 20 Ill. 296. S. P. Russell v. Steuben, 57 Ill. 35; Clute v. Bond Co., Ill. Sup. Ct. January, 1871. *Defective bridge*. Mechanicsburg v. Meredith, 54 Ill. 84, 1870. *Ante*, sec. 579. *Post*, sec. 789.

Under a statute which proves that "an action may be maintained against a county, either upon contract or for an *injury* to the rights of the plaintiff arising from some act or omission of the county," it is held in Oregon that the county is liable for an injury caused by the road supervisor's neglect to repair a *defective bridge*, the county having the power to appoint and remove such supervisors. McCalla v. County, 3 Ore. 424, 1869.

Where a *canal company* is by its charter required "to build and keep in good repair *bridges*" where the canal should cross a road, it is liable to a traveller for the injury caused by an insufficient bridge, though there be no willful or actual negligence on the part of the company. Canal Company v. Graham, 63 Pa. St. 290, 1869. For what defects liable. *Id.* *Post*, sec. 796 and note.

Canada statute and decisions. The municipal act of Upper Canada contains the following very carefully framed section: Sec. 339. "Every such

shall presently see,¹ the quite uniform holding of the courts as to *municipal corporations proper* has been otherwise,

road, street, bridge, and highway shall be kept in repair by the corporation, the default of the corporation so to keep in repair, shall be a misdemeanor punishable by fine in the discretion of the court, and the corporation shall be further civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained; and this section shall not apply to any road, street, bridge, or highway laid out without the consent of the corporation by by-law, until established and assumed by by-law." Harr. Munic. Man. (2d ed.) p. 275. The following notes of decisions under the statute are taken from the volume last quoted.

The phrase "kept in repair" is not to be construed as if it meant "construction" in the first instance. *The Queen v. Board, &c.*, 8 Law Times N. S. 888. The words keeping in repair, should be construed with a reasonable attention to circumstances. A new side line or concession line opened in a township thinly scattered, could scarcely be expected to be found in as perfect a condition as an old highway in a well settled township, *per Robinson, C. J.*, in *Colbeck v. The Corporation of Brantford*, 21 U. C. Q. B. 276.

It is *no defence* to an action against a municipal corporation for negligence in the non-repair of a road, that they appointed a proper overseer of highways and gave him means and authority to keep the road in good order. The municipal corporation is, as it were, itself the overseer of the highway, and on this principle bound to keep it in repair. It has not only the duty thrown expressly upon it of keeping highways in repair, but has all necessary powers given it for enabling it to perform that duty. The corporation must at its peril answer for the consequences of the duty not being performed. The negligence of its officers or servants is no answer. *Per Robinson, C. J.*, in *Colbeck v. The Corporation of Brantford*, 21 U. C. Q. B. 276. Independently of the statute it would appear that there is a common law duty cast on municipal corporations to repair and keep in repair the roads which are within their jurisdiction, and for which they have power to raise the requisite funds. See *Wellington v. Wilson*, 14 U. C. C. P. 399; *S. C.*, 16 U. C. C. P. 124; *Harrold v. County of Simcoe and County of Ontario*, 16 U. C. C. P. 43. But it is not their duty, either under the statute or at common law, to lay a plank from each man's house across a ditch to the street, and to keep such planks in repair. *McCarthy v. Village of Oshawa*, 19 U. C. Q. B. 245. The *limitation as to time* (three months) applies only to acts of omission, *i. e.*, non-repair, but not to acts of commission, as negligently placing gravel on the sides of the road and taking no precaution to prevent persons passing along the road from running against these heaps, whereby a person so driving might run against the heaps and be thereby injured. *Rowe v. Leeds and Grenville*, 18 U. C. Q. B. 575. Where the section is applicable, no additional time is given to a legal rep

¹ *Infra*, sec. 789.

though the ground for the distinction which gives an action if the injury happens within the limits of a municipality having control of the streets therein, and denies it if it happens within the limits of a township or county having equal control over the highways and adequate means of discharging its public duties in respect thereto, is not as satisfactory to the mind as could be desired. With few exceptions, the courts have agreed in holding that these lower or more general forms of corporate organization are not impliedly liable to such actions. There is somewhat more diversity of view respecting the implied liability of municipal corporations proper, where the control over streets exists, but no action for neglect is expressly given; still, the two classes of cases establish, upon authority, the distinction mentioned.

§ 786. The difficulty of satisfactorily ascertaining the grounds of the difference in the liability of the two classes of corporations is avoided in the New England states, by the course of adjudication therein on the subject. It was decided, as we have seen, at an early day, that *towns*¹ were not liable to such actions unless the liability be created by statute, and that view has been maintained ever since, and applies, as respects defective and unsafe ways, equally to *streets in cities and highways in towns*. It being established that there was no common law obligation upon towns to respond for neglect of duty in respect to highways and bridges, the legislatures of each of the New England states have imposed the duty upon towns to keep their highways

representative to bring the action, owing to the death of the intestate, by reason of negligence within the meaning of the section. *Turner v. The Corporation of Brantford*, 18 U. C. C. P. 109. The statute begins to run from the occurrence of the accident, not from the death. *Miller v. The Corporation of North Fredericksburgh*, 25 U. C. Q. B. 81. So where plaintiff's mare fell through a bridge and was injured, but did not die for four months afterwards, when the action was brought, it was held to be too late. His damages in the words of the statute were then and from that time sustained. The subsequent death of the mare was merely additional evidence of the extent of his damages. The damage was not the less because he did not at the time know its full extent. *Id.*

¹ *Supra*, secs. 762, 763. As to nature of New England towns: *Ante*, sec. 11.

in repair, so as to be safe and convenient for travelers, and have given, in terms, to persons injured by neglect to discharge this duty, an action against the town. The substance of *the statutes of the New England states* in this respect, and upon which the decisions to be referred to have been made, is given in the note.¹ Upon *neither towns nor*

¹ *Massachusetts statute*.—By the Revised Statutes, chap. XXV. sec. 1, "All highways, townways, causeways, and bridges within the bounds of any town" are required to "be kept in repair at the expense of such town, so that the same may be *safe and convenient for travelers*, with their horses, teams, and carriages, at all seasons of the year." By sec. 22, it is provided that "if any person shall receive any injury in his person or property by reason of any *defect or want of repair*, which has existed for the space of twenty-four hours in any highway," he may *recover compensation therefor*. And the same provision, with the exception of the limitation of twenty-four hours, is re-enacted in the statute of 1850, chap. V. and, in substance, in the General Statutes of 1860, chap. XLIV. sec. 22, p. 247. History of legislation traced by Hoar, J.: Stanton v. Springfield, 12 Allen, 566.

Rhode Island.—Substantially the same. Construed. Providence v. Clapp, 17 How. 161.

Vermont statute.—The language of the Vermont statute is: "If any special damage shall happen to any person, his team, carriage, or other property, by means of the *insufficiency or want of repair* of any highway or bridge in any town, which such town is bound to repair," the town shall be liable.

Connecticut statute.—The Connecticut statute, in substance, is, that the several towns shall make and keep in *good and sufficient repair* all the needful highways and bridges, &c., and if *any person shall be injured*, in his person or property, through, or by means of, a defect in the road or bridge, he may recover damages of the town, &c.

New Hampshire statute.—In New Hampshire, by the statute of February 27, 1786, it is provided, "that in case any special damage shall happen to persons or their teams or carriages by means of the *insufficiency or want of repair* of any highway or bridge in any town or parish, the party aggrieved shall recover his damage in an action against such town or parish. And the said town shall have a remedy over against the surveyor of highways through whose fault or neglect the same happened." Revised Statutes, chap. XLVII. sec. 1.

Maine statute.—By the statute in Maine (Revised Statute of 1841, chap. XXV.) all highways, &c. are to be "*kept in repair and amended* from time to time, that the same may be *safe and convenient* for travellers," &c.; in default thereof, the town in which such neglect of duty occurs is made liable. And any person receiving "any bodily injury," or suffering "any damage in his property, through any defect or want of repairs, * * * may recover, in a special action of the case, of the county, town, or persons who are by law liable to repair the same, the amount of damages thereby

cities, in the view of the courts of New England, is there any implied liability for injuries resulting from defective streets or sidewalks; the liability is wholly statutory.¹ An important consequence is that every case of this character must be within the statute; and hence the liability of the town or city does not extend to persons not within the protection of the statute;² and hence, also, if it only gives a right of action when the defect has existed a certain length of time, this time must have elapsed when the injury happened, in order to make it actionable.

§ 787. The judicial reports of the New England states abound with *decisions, under these statutes*, respecting

sustained, if such county, town, or person had *reasonable notice* of the defect or want of repair."

¹ It is the language of one of the most accomplished judges that ever sat upon the uniformly able supreme judicial bench of Massachusetts, speaking of this subject, that, "The liability of towns for defects in ways is wholly the creation of statutes, and is a liability strictly limited and peculiar." *Per Hoar, J., Oliver v. Worcester*, 102 Mass. 489, 496, 1869; *Mower v. Leicester*, 9 Mass. 247, 1812; *Commonwealth v. Springfield*, 7 Mass. 9, 1810; *Brady v. Lowell* (city of), 3 Cush. 121, 124, 1849; *Bacon v. Boston*, 3 Cush. 174, 1849; *Brailey v. Southborough*, 6 Cush. 141, 1850; *Smith v. Dedham*, 8 Cush. 522, 1851; *Hixon v. Lowell*, 13 Gray, 59, 64, 1859; *Vinal v. Dorchester*, 7 Gray, 421, 422. "The obligation resting upon towns in relation to the support of highways and bridges, is not imposed by the common law, but is wholly a creature of the statute." *Per Waite, J., in Chisey v. Canton*, 17 Conn. 475, 478, 1846, approving *Mower v. Leicester*, 9 Mass. 247; *Reed v. Belfast*, 20 Maine, 248. So in *New Hampshire*: *Farnum v. Concord*, 2 N. H. 392, 1821, approved in *Eastman v. Meredith*, 36 N. H. 284, 1858; and note remarks of *Perley, C. J.*, in the conclusion of his masterly opinion, pp. 298, 301. So in *Maine*: *Reed v. Belfast*, 20 Maine, 246, 248; *Sanford v. Augusta*, 32 Maine, 536; *Peck v. Ellsworth*, 36 Maine, 393. And *Vermont*: *Baxter v. Winooki Turnpike Company*, 22 Vt. 114, 123, 1849; *Hyde v. Jamaica*, 27 Vt. 448, 457, *per Bennett, J.*; *State v. Burlington*, 36 Vt. 521, *per Poland, C. J.* See, also, *Kitredge v. Milwaukee*, 20 Wis. 46.

² As the duty, under the statute of Massachusetts, is only towards *travelers*, it does not extend to the case of a person who is using the highway simply for the *purposes of play*. *Blodgett v. Boston*, 6 Allen, 287, 1864. Commented on by *Hoar, J., Higginson v. Nahant*, 11 Allen, 530, 535, 1866. Same principle: *Stickney v. Salem*, 3 Ib. 374; distinguished, see *Britton v. Cummington*, 107 Mass. 347; *Stinson v. Gardiner* (city of), 42 Maine, 248, 1856; *Harper v. Milwaukee*, 30 Wis. 365, 1872.

³ *Brady v. Lowell*, 3 Cush. 121, 1849.

what constitutes an actionable defect, insufficiency, or want of repair in a street or highway; what is required of towns in order to discharge their duty under the statute and escape liability; how much of the highway or street must be made safe and convenient; what degree of care is required of the plaintiff; what injuries result so directly and immediately from the defective or insufficient way, as to be within the statute; and questions of a like character. It will be perceived that these statutes are general in their language, and, in substance, impose the duty on towns (and they extend to cities as well) to make *their ways safe and convenient, and give an action for injuries* occasioned to the person or property of travelers by reason of *any defect or want of repair*. How far the duty they impose is coincident with the corresponding duty, which in other states is held by the courts to rest by implication upon municipal corporations, so as to make the adjudications in New England precisely applicable elsewhere, is a question respecting which we can properly do little more than to lay before the reader data to enable him to form upon it his own judgment. We venture to remark, however, that it is quite probable these statutes, as construed, do impose, in some respects, a greater measure of liability than would elsewhere be held to exist by implication. Many of the questions, however, which have arisen in actions upon them are obviously general in their nature, as, for example, the degree of care required of the plaintiff; what injuries may justly be regarded as proximately caused by the unsafe or insufficient highway; the evidence competent in such actions, and to some extent, the rules to measure the recovery; and the opinions of the courts of these states in deciding or discussing them may always be consulted with interest, and often with advantage, by the legal or judicial inquirer.

§ 788. Generally speaking, it may, perhaps correctly, be said that, under these statutes, a town or city charged with the duty of keeping its highways or streets in repair performs that duty when the traveled way is without obstruction or structural defects which endanger the safety of travelers, and is sufficiently level and smooth, guarded by railings where necessary, to enable persons, by

the exercise of ordinary care, to travel with safety and convenience.'

The decisions respecting actionable defects under these statutes have been classified as follows:—

1. Want of railings.
2. Obstructions to the traveled path by rocks, stones, wood, timber, posts, snow, ice, &c.
3. Holes or excavations in the traveled path, or so immediately contiguous as to make the highway itself unsafe.
4. Defective bridges and causeways, insufficient to support travelers.
5. Awnings, the doctrine in respect of which is limited and peculiar, if not exceptional.

In a work general in its character, like the present, it would not be in place to notice at length the cases arising under these local statutes. Following the classification just mentioned, it must suffice briefly to refer to some of the more important of them in the notes. By recurring to the statutes heretofore given,¹ the precise force and value of the decisions upon them will be better apprehended, and, in the light of these decisions, the state of the law in this country upon the general question of the *implied liability of municipal corporations* in respect of defective and unsafe streets and ways, be better understood.²

¹ *Hixon v. Lowell*, 18 Gray, 59, 1859, *per Hoar*, J.; *Barber v. Roxbury*, 11 Allen, 818, 1865, *per Gray*, J.

² *Per Chapman*, J., in *Keith v. Easton*, 2 Allen, 552, 553, 1861; *Barber v. Roxbury*, 11 Allen, 818, 820, *per Gray*, J.; *Sparhawk v. Salem*, 1 Allen, 30, 1861.

³ *Supra*, sec. 786, note.

⁴ DECISIONS IN THE NEW ENGLAND STATES RESPECTING DEFECTIVE STREETS AND SIDEWALKS—"Safe and convenient," duty thus imposed, defined: *Raymond v. Lowell*, 6 Cush. 524, 534, 1850; reviewed, *Hubbard v. Concord*, 35 N. H. 52, 1857; *Gregory v. Adams*, 14 Gray, 242, 1859, *per Merrick*, J.; *Hixon v. Lowell*, 18 Gray, 59, 1859, *per Hoar*, J.; *Church v. Cherryfield*, 33 Maine, 460, 1851; *Johnson v. Haverhill*, 35 N. H. 74, 1857, where the rule adopted by the Supreme Court as the proper construction of the statute is stated; *Hubbard v. Concord*, 35 N. H. 52; *Davis v. Bangor*, 42 Maine, 522, 1856; *Packard v. New Bedford* (oblique gutter across street), 9 Allen, 200; *Keith v. Easton*, 2 Allen, 552, *per Chapman*, J. Compare *Morse v. Richmond*, 41 Vt. 485, and note; S. C., 8 Am. Law Reg. (N. S.) 81; *Leicester v. Pittsford*, 6 Vt. 245, 1834; *Frindle v. Fletcher*, 39 Vt. 255, 1867; and

§ 789. It may be fairly deduced from the many cases upon this subject referred to in the notes, that in the absence

Clark v. Corinth, 41 Vt. 449, 1868, cited with approval, by *Dixon, C. J.*, in *Ward v. Jefferson*, 24 Wis. 342, 1869; *Loan v. Boston*, 106 Mass. 450, 1871.

The defect in the highway or street must be the DIRECT AND PROXIMATE CAUSE of the special damage for which the statute gives an action. *Adams v. Carlisle*, 21 Pick. 146; *Holman v. Townsend*, 13 Met. 297, 299, 1847; *Horton v. Ipswich*, 12 Cush. 488, 1853; *Lund v. Tyngsboro* (on leaping from carriage on near approach to defect), 11 Cush. 563, 1853; *Tuttle v. Holyoke*, 6 Gray, 447, 1856; *Sears v. Dennis*, 105 Mass. 310, 1870; *Stickney v. Maidstone*, 30 Vt. 738, 1858, and cases cited by *Pierpont, J.*; *Manderschid v. Dubuque*, 29 Iowa, 73, 1870. Ordinary iron gas box in sidewalk with projecting rim, uncovered, may be an actionable defect. *Loan v. Boston*, 106 Mass. 450.

Defect causing team to be frightened. *Marble v. Worcester*, 4 Gray, 395, 1855; *Cook v. Charlestown*, 98 Mass. 80, 1867. Compare *Morse v. Richmond*, 41 Vt. 435; S. C., 8 Am. Law Reg. (N. S.) 81, and note of Judge *Redfield*. *Fright of team by accident, and injury thereto by a defect in the highway.* *Davis v. Dudley*, 4 Allen, 557, 1862, distinguished from *Palmer v. Andover*, 2 Cush. 600, and *Howard v. North Bridgewater*, 16 Pick. 189, explained; *Fogg v. Nahant*, 98 Mass. 578, 1868; *Jackson v. Bellevieu*, 30 Wis. 250, 1872. See *Manderschid v. Dubuque*, 25 Iowa, 108, disapproving *Davis v. Dudley, supra*. *Whether injury caused jointly by defective road and defect in plaintiff's wagon, horse, or harness, is actionable, see conflicting views in Vermont and Massachusetts on the one hand, and Maine on the other.* *Hunt v. Pownal*, 9 Vt. 418; *Rowell v. Lowell, supra*; *Howard v. North Bridgewater*, 16 Pick. 189; *Marble v. Worcester*, 4 Gray, 395; *Palmer v. Andover*, 2 Cush. 600, 1849; *Shepherd v. Chelsea*, 4 Allen, 113; 1862; *Fogg v. Nahant*, 106 Mass. 278; S. C., 98 Mass. 578; *Moore v. Abbott*, 32 Maine, 46, 1850; *Farrar v. Greene*, 32 *Id.* 574; *Moulton v. Sanford*, 51 Maine, 127, 1862, following *Moore v. Abbott, supra*, which is denied to be law in *Winship v. Enfield*, 42 N. H. 197, 1860; *Lacon v. Page*, 48 Ill. 499; *Joliet v. Verley*, 35 Ill. 63; *Aurora v. Pulfer*, 56 Ill. 270, 1870.

Want of railings or barriers. If rails or barriers are necessary for the proper security of travelers, the authorities charged with the duty of keeping the roads in repair and safe condition must furnish them. *Palmer v. Andover*, 2 Cush. (Mass.) 600, 1849; commented on in *Rowell v. Lowell*, 7 Gray (Mass.) 100, 102; *Jones v. Waltham* (falling into cattle guards), 4 Cush. 299, 1849. Liability of railroad company: *Id.* 202, *per Metcalf, J.*; *Alger v. Lowell*, 3 Allen (Mass.), 402, *Id.* 38; *Murphy v. Gloucester*, 105 Mass. 470; *Commonwealth v. Wilmington*, 105 Mass. 599; *Koester v. Ottumwa*, 34 Iowa, 41, 1871; *Burnham v. Boston* (dangerous excavation), 10 Allen, 290, 1865; *Stinson v. Gardner* (city of), 42 Maine, 248, 1856; *Doherty v. Waltham* (barriers removed by stranger in night time), 4 Gray, 596, 1855; *Davis v. Hill*, 41 N. H. 329, 1860; *Hayden v. Attleborough*, 7 Gray, 338, 1856; *Williams v. Clinton* (want of railing on embanked highway), 28 Conn. 264, 1859; *Tolland v. Willington*, 28 *Id.* 587; *Houfe v.*

of an express statute imposing the duty and declaring the liability, *municipal corporations proper* having the powers

Fulton, 29 Wis. 296. Duty to close or bar, by visible signs, if unsafe: Blaisdell v. Portland, 39 Maine, 113, 1855; Loker v. Damon, 17 Pick. 284; Drury v. Worcester, 21 Pick. 44; Koester v. Ottumwa, 34 Iowa, 41, 1871. When road or street regarded as opened: State v. Cornville, 43 Maine, 427, 1857; Bowman v. Boston, 5 Cush. 1; Kellogg v. Northampton, 8 Gray, 504, 1857. Towns not bound to fence or erect barriers to prevent travelers from getting outside of the way when there is no unsafe place immediately contiguous. Sparhawk v. Salem, 1 Allen, 30, 1861; Murphy v. Gloucester, 105 Mass. 470, and cases cited by Morton, J.; Nebraska City v. Campbell (want of railing), 2 Black, 590; Chicago v. Gallagher, 44 Ill. 295, 1867.

Obstructions to the TRAVELED path. Towns must remove actionable obstructions to the traveled path or route by whomsoever placed there. But "are not liable for obstruction in portions of the highway, not part of the traveled path, and not so connected with it that they will affect the security or convenience for travel of those using the traveled path." Smith v. Wendell, 7 Cush. 498, 500, 1851, *per Dewey, J.*; Shepardson v. Colerain, 13 Met. 55; Kellogg v. Northampton, 4 Gray, 65, 1855; S. C., 8 Gray, 504; Howard v. North Bridgewater, 16 Pick. 189; Cogswell v. Lexington, 4 Cush. 307; Hayden v. Attleborough, 7 Gray, 338, 1856; Wheeler v. Westport, 30 Wis. 329. *Illustrations of what are obstructions:* A stick of timber, logs, &c.: Springer v. Bowdoinham, 7 Maine, 442, 1831; Snow v. Adams, 1 Cush. 443, 1848. Stones in the road-bed off the traveled highway: Bigelow v. Weston, 3 Pick. 267, 1825; Smith v. Wendell, 7 Cush. 498; Kellogg v. Northampton, 4 Gray, 65. Logs by the side of traveled path: Johnson v. Whitefield, 13 Maine, 286; Davis v. Bangor, 42 Maine, 522, 527, *per Appleton, J.*; Snow v. Adams, 1 Cush. 443, 1848. A post by the side of the road, within the general course of travel: Cogswell v. Lexington, 4 Cush. 307. But see McComber v. Taunton, 100 Mass. 255. As to rope extended across the street being an obstruction or defect: French v. Brunswick, 21 Maine, 29, 1843. But see Barber v. Roxbury, 11 Allen, 318, 1865, that it is not. "*Obstructions,*" or want of repairs, defined by Bartlett, J.: Ray v. Manchester, 46 N. H. 59, 1865. Loaded wagons standing on a street under care of a driver not "a defect or want of repair" of street: Davis v. Bangor, 42 Maine, 522, 1856.

Injury received by traveler outside of the road, though the road itself was dangerous, not within the statute, of which the words are, "injury by reason of any defect" in the highway: Tisdale v. Norton, 8 Met. 388, 1844. Nor ordinarily actionable: Sparhawk v. Salem, 1 Allen, 30, 1861. The doctrine in Massachusetts is, that the damage, in order to be actionable, must be occasioned by causes entirely within the highway: Richards v. Enfield, 13 Gray, 344, 346, *per Bigelow, J.*, citing and following Rowell v. Lowell, 7 Gray, 100, 1856. See, also, Keith v. Easton, 2 Allen, 552, 1861; Baltimore v. Branman, 14 Md. 227, 1859. *Right to go extra viam:* Campbell v. Race, 7 Cush. 408, 410, and authorities cited.

Width to be kept in repair: Howard v. North Bridgewater, 16 Pick. 189,

ordinarily conferred upon them respecting bridges, streets, and sidewalks within their limits, owe to the public the duty

1834, recognized in *Shepardson v. Colerain*, 18 Met. 55, 59, 1847; *Bacon v. Boston*, 8 Cush. 174, 1849, relating to width of sidewalk, and distinguished from *Howard v. North Bridgewater*, *supra*; *Smith v. Wendell*, 7 Cush. 498; *Kellogg v. Northampton*, 4 Gray, 65, 7 Gray, 388. Whether *wide* enough to be *safe* is for the jury; so, whether it should be made safe and convenient its whole width: *Johnson v. Whitefield*, 18 Maine, 286; *Aldrich v. Pelham*, 1 Gray, 510; *Savage v. Bangor*, 40 Maine, 176.

Latent defects; liability for: *Prindle v. Fletcher*, 39 Vt. 257, cited with approval, 24 Wis. 342, 1869; see 26 Wis. 56.

SIDEWALKS. Liability of town or city for actionable defects extends to sidewalks, they being deemed to constitute part of the street. *Bacon v. Boston* (a deep opening made by adjoining owner for cellar window), 8 Cush. 174, 1849; *Lowell v. Spaulding*, 4 Cush. 275. *Id.* 277; *Kirby v. Market Association*, 14 Gray, 249, 1859; *Manchester v. Hartford*, 30 Conn. 118, 1861; *Hubbard v. Concord*, 35 N. H. 52, 1857, reviewing *Raymond v. Lowell*, 6 Cush. 524, and defining measure of duty, as respects sidewalks. Duty as respects crossings; foot passengers, where to cross. *Raymond v. Lowell*, 6 Cush. 524, 1850; *Brady v. Lowell*, 3 *Id.* 121, 1849. Right of *foot travelers* to travel *along* and *across* street. *Id.*; *Coombs v. Purrington*, 42 Maine, 332, 1856; *Bacon v. Boston*, 8 Cush. 174; *Baker v. Savage*, 45 N. Y. 191, 1871. *What inequalities in surface actionable.* *Raymond v. Lowell*, 6 Cush. 524; *Hubbard v. Concord*, 35 N. H. 52; *Smith v. Wendell*, 7 Cush. 498; *Winn v. Lowell*, 1 Allen, 177; *Lacon v. Page*, 48 Ill. 499; *Loan v. Boston*, 106 Mass. 450.

SNOW AND ICE. Under statute requiring highways to be made "safe and convenient at all seasons," &c. it is held that towns and cities are liable for defects and obstructions caused by snow and ice rendering them unsafe, the later decisions tending to restrict their liability. *Loker v. Brookline*, 18 Pick. 343, 1832; *Horton v. Ipswich*, 12 Cush. 488, 1853; *Hall v. Lowell* (injury upon sidewalk covered with ice), 10 Cush. 260, 262, 1852, remarks of *Metcalf, J.*; *Stanton v. Springfield* (doctrine carefully stated by *Hoar, J.*), 12 Allen, 566, 1866; *Shea v. Lowell*, 8 Allen, 186; *Id.* 187; *O'Neill v. Lowell*, 6 Allen, 110, 1868; *Street v. Holyoke*, 105 Mass. 82, 1870, and cases cited by *Colt, J.*; *Stone v. Hubbardston* (when ice a defect), 100 Mass. 49, 57, 1868, and cases cited by *Gray, J.*; *Gilbert v. Roxbury*, *Id.* 185; *Landolt v. Norwich* (Superior Court of Connecticut), 6 Am. Law Reg. (N. S.) 383, 1872; S. C., 87 Conn. 615. Liability extends to travelling *across* as well as passing *along* the sidewalk. *Street v. Holyoke*, 105 Mass. 82; *Providence v. Clapp*, 17 How. (U. S.) 161, 1854, construing statute of Rhode Island, which is substantially the same as that of Massachusetts; *Green v. Danby*, 12 Vt. 388, 1840; *Barton v. Montpelier*, 30 Vt. 650, 1858; *Tripp v. Lyman* (defect occasioned by *freezing and thawing*), 37 Maine, 250, 1854; *Durkin v. Troy*, 61 Barb. 437; *Mosey v. Troy*, 61 Barb. 580; *Savage v. Bangor*, 40 Maine, 176, 1855; *Hubbard v. Concord* (descending sidewalk *icy* and slippery), 35 N. H. 52; *Id.* 74; *Hall v. Manchester*, 40 N. H. 410,

to keep them in a safe condition for use in the usual mode by travelers, and are liable in a civil action for special inju-

1860. *As to liability elsewhere*: *Cook v. Milwaukee*, 24 Wis. 270, 1869; S. C., 27 Wis. 191; *Ward v. Jefferson*, 24 Wis. 842, 1869, construing statute of Wisconsin; *Baltimore v. Mariott*, 9 Md. 160, 1856; *Atchison v. King*, Supreme Court of Kansas, not yet reported; *Collins v. Council Bluffs*, 32 Iowa, 324; 7 Alb. Law Jour. 33.

The owner or occupant of the building is not liable in such cases to the person injured on the sidewalk in front from *natural accumulations* of snow and ice. *Kirby v. Market Association*, 14 Gray, 249, 1859. Owner liable for injury caused by snow and ice falling from the roof. *Shipley v. Fifty Associates*, 101 Mass. 251.

AWNINGS AND FALLING SUBSTANCES. The statute of Massachusetts, before cited (*ante*, sec. 786, note), is held to extend to injuries caused by defective awnings projected over the sidewalk, and where the defect or want of repair in the projection is of a nature to render its continuance dangerous to the public safety. *Drake v. Lowell*, 13 Met. 292, 1847; *Day v. Milford*, 5 Allen, 98. The question is close, and is admitted to reach the utmost limit of corporate liability, and the liability is regarded as exceptional. *Per Chapman, J.*, in *Keith v. Easton*, 2 Allen, 552, 1861; *Barber v. Roxbury*, 11 Ib. 318. And it was held in *Hixon v. Lowell*, 13 Gray, 59, 1859, that a city was not liable where the only defect in the street is the *projection from the roof* of a building not owned by the city of a mass of ice and snow which had gradually accumulated there until it overhung the traveled way and rendered the passing beneath dangerous. Nor is a city liable for injury sustained by a traveler on a sidewalk by the falling on him of a sign suspended over the sidewalk by the adjoining proprietor, and insecurely fastened, although the city had notice of the position and unsafe condition of the sign. *Jones v. Boston*, 104 Mass. 75, 1870. Nor by the *falling of an iron weight* attached to a flag which was suspended across the street by third persons. *Huison v. New Haven*, 36 Conn. 136. Both of the cases last cited follow *Hixon v. Lowell*, 13 Gray, 59, in preference to *Drake v. Lowell*, 13 Met. 292, and state the distinction which, in *Hixon v. Lowell*, the court thought it easier to feel than express. 6 Am. Law Rev. 566. But is it easy either to feel or express the distinction? And does not the difficulty come from holding that the *statute* embraced a case like *Drake v. Lowell*? See *Jones v. New Haven* (falling of dead limb from tree in public square), 34 Conn. 1, 1867. *Salisbury v. Herchenroden*, 106 Mass. 458. *Owner, and not tenant*, responsible for safety of awning, and if the town is held liable, it may recover over from the owner. *Milford v. Holbrook*, 9 Allen, 17, 1864; *Lowell v. Short*, 4 Cush. 275; *Ib.* 277; *Shipley v. Fifty Associates*, 106 Mass. 194, 1870. *Infra*, sec. 795. In New York, *Hume v. New York*, 46 N. Y. 689, 1872; *Taylor v. Peckham*, 8 Rh. Is. 349.

Dangerous holes or excavations in or near traveled way. *Cobb v. Standish* (muddy watering place by the roadside), 14 Maine, 198, 1837; *Reed v. Northfield* (hole in the road), 13 Pick. 94, 1832; *Norwich v. Breed*, 30 Conn.

ries resulting from neglect to perform this duty.¹ Such a duty and liability are considered to exist, without a positive statute, when the following conditions concur: 1. The *place* in question, whether bridge, sidewalk, or street, must be one *which it is the duty of the corporation to repair or keep in a safe condition*; and this *duty* (to keep in repair), if not specifically enjoined, must arise upon a just construction of the charter or statutes applicable to the corporation. 2. This duty or burden must appear upon a fair view of the charter or statutes to be imposed, or rest upon the *municipal corporation, as such*, and not upon it as an agency of the state, or upon its officers as independent public officers. (This, however, in general, appears sufficiently where the municipality sought to be made liable exists under a special charter or general act which confers upon it peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the state at large under its general enactments concerning ways.) 3. The *power to perform the duty* of maintaining the streets in a safe condition, by authority to levy taxes or impose local assessments for the purpose, must be (as it almost always is) conferred upon the corporation.²

535, 1862; *Murphy v. Gloucester*, 105 Mass. 470; *Ghenn v. Provincetown*, 17 b. 313; *Koester v. Ottumwa* (insufficient barricade), 84 Iowa, 41.

Defective bridges and causeways are actionable. Degree of strength required: criterion of sufficiency. *Richardson v. Turnpike Company*, 6 Vt. 496, 1834; *Ante*, sec. 785; *Gregory v. Adams*, 14 Gray, 242, where an elephant was injured by a bridge giving way. *Latent defect in bridge*: *Ralphs v. Moore*, 68 Pa. St. 404.

Lighting highways and streets. Cities and towns are under no obligation to light their highways or streets. *Randall v. Railroad Co.*, 106 Mass. 276, 1871.

¹ Enforcing this duty by *mandamus*. See *ante*, sec. 673. By *indictment*. *Ante*, secs. 745-748.

² *Weightman v. Washington*, 1 Black (U. S.) 39, 1861 (corporate liability for unsafe bridge); distinguished from *Providence v. Clapp*, 17 How. (U. S.) 161; and from *Russell v. Men of Devon*, 2 Term R. 661; and approving *Henley v. Mayor, &c. of Lyme*, 5 Bing. 91; S. C., 3 Barn. & Adolph. 77; S. C., 2 Cl. & Fin. 331. *Weightman v. Washington*, above cited, was followed by *Nebraska City v. Campbell*, 2 Black., 590, 1862, where a city corporation, with control over streets, and power to levy taxes to keep them in repair, which left a bridge on a street over a creek defective and unsafe for want of side railing, was held liable for damages happening in consequence.

Where the duty to keep streets in repair is, in terms, enjoined upon the corporate authorities, and they are supplied

See, also, *Chicago v. Robbins*, 2 Black. 418, 1862; S. C., again, 4 Wall. 657, 1866; *Mayor v. Sheffield* (stump in sidewalk), 4 Wall. 189, 1866; *Hutson v. Mayor of New York*, 9 N. Y. (5 Seld.) 163, 1853. *Mason, J.*, admits existence of cases of contrary bearing where the means to keep in repair are limited, but regards them as not applicable, since the city of New York "is possessed of the most ample powers in this respect." *Id.* 170. See Same Case, 6 Sandf. Superior Ct. 289, and exposition of the ground on which it was decided by *Denio, J.*, 9 N. Y. (5 Seld.) 456, 458, in *Griffin v. Mayor, &c. of New York*. And see, also, *Lloyd v. Mayor, &c. of New York*, 5 N. Y. (1 Seld.) 369, 1851; *Mayor, &c. of New York v. Furze*, 3 Hill, 612, 1842; approved by *Selden, J.*, 16 N. Y. 162, note; 5 Seld. 168; *Id.* 458; explained, 1 Denio, 595; 32 N. Y. 165; *Conrad v. Ithaca*, 16 N. Y. 158, 1857; *Weet v. Brockport, Id.* 161, and review of cases in the learned opinion of *Selden, J.*; *Storrs v. Utica*, 17 N. Y. 104, and cases cited; *Davenport v. Ruckman*, 37 N. Y. 568, 1868, in which *Hunt, C. J.*, declares that the liability of the corporation of the city of New York extends to injuries arising from the omission of the duty to repair, as well as to those arising from some act done by it. *Requa v. Rochester*, 45 N. Y. 129, 1871; *Erie v. Schwingle*, 22 Pa. St. 384, 1853. *Willful neglect not essential to liability*; and as to defence of want of funds, and want of means to raise them, see remarks of *Black, C. J.*; *Id.* 384, 389. *As to bridges*, see *ante*, secs. 579, 580, and index—*Bridge*. *Blake v. St. Louis*, 40 Mo. 569; *Smith v. St. Joseph*, 45 Mo. 449; *St. Paul v. Kirby* (injury to child), 8 Minn. 154; *St. Paul v. Seitz*, 3 *Id.* 297; *Topeka v. Tuttle*, 5 Kansas, 425; *Atchison v. King*, Sup. Ct. of Kansas, not yet reported; *State v. Mayor, &c.*, 11 Humph. (Tenn.) 217, 1850, *per McKinney, J.*; *Smoot v. Wetumpka*, 24 Ala. 112, 1854; *Browning v. Springfield*, 17 Ill. 143, 1855; *Joliet v. Verley*, 35 Ill. 58; *Bloomington v. Bay*, 42 Ill. 503; *Chicago v. Gallagher*, 44 Ill. 295; *Chicago v. Johnson*, 58 Ill. 91; *Decatur v. Fisher, Id.* 407; *Rusch v. Davenport* (defective bridge), 6 Iowa, 443, 1858; *Rowell v. Williams*, 29 *Id.* 210, 1870; *Ellis v. Iowa City, Id.* 229; *Id.* 73; *Soper v. Henry County*, 26 *Id.* 264, 1868; *McCullom v. County*, 21 *Id.* 409; *Pease v. Dayton* (defective bridge), 4 Ohio St. 80, 1854; *Tallahassee v. Fortune*, 3 Flor. 19, 1850; *Baltimore v. Marriott* (ice on pavement), 9 Md. 174; *Baltimore v. Pennington*, 15 Md. 12, 1859; *Baltimore v. Brannan* (accident in a place not public), 14 Md. 227, 1859; *Shartle v. Minneapolis*, 17 Minn. 308, 1871, defective bridge; *McDonough v. Nevada City*, 6 Nev. 90, 1870; *Hines v. Lockport*, 5 Lans. 17; *Covington v. Bryant*, 7 Bush (Ky.) 248, 1870; *Wheeler v. Westport* (what is a defect?) 30 Wis. 392, *Ante*, sec. 785; *Koester v. Ottumwa* (insufficient barricade), 34 Iowa, 41.

The principles stated in the text find no little support in the general reasons on which the judgments in several important recent cases in England rest. *Foreman v. Canterbury*, Law R. 6 Q. B. 214, 1871; *Mersey Dock Cases*, Law R. 1 H. L. 93; S. C., 11 House of Lords Cases, 686, 1866. *Contra*. In New Jersey the view is taken that the duty of a city in respect to the

with the means to perform it, there is little difficulty, we think, in holding the corporation liable, on the general principles of the law, without an express statute declaring the liability to a civil action by any one specially injured by its neglect to discharge this specific duty. But where the duty to repair is not specifically enjoined, and an action for damages, caused by defective streets, is not expressly given, still both the duty and the liability, if there be nothing in the charter or legislation of the state to negative the inference, has often, and, in our judgment, properly, been deduced from special powers conferred upon the corporation to open, grade, improve, and *exclusively control* public streets within their limits, and from the means which, by taxation and local assessments, or both, the law places at its disposal to enable it to discharge this duty.

The municipal corporation is not an insurer against accidents upon the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day, and whether they are so or not is a practical question, to be determined in each case by its particular circumstances.¹

repair of its streets is a *public duty* (not a corporate one), and that the neglect to perform it will not give a private remedy without an express statute: *Pray v. Jersey City*, 32 N. J., 394, 1868; reaffirming *Freeholders v. Strader* (*quasi* corporation), 3 Harr. (N. J.) 108, 1840. See, also, *Detroit v. Blakeby*, 21 Mich. 84; S. C., 9 Am. Law Reg. (N. S.) 670, with note. In Maryland the other extreme is held, and counties are liable without an express statute to a private action in respect of defective roads, on the ground that a public duty is enjoined with the means of performance, and that the public have a remedy for neglect by indictment, and a party specially injured by action. *County Commissioners v. Duckett*, 20 Md. 468, 1863. *County Commissioners v. Gibson*, 36 Md. 229; *ante*, sec. 761, note. See *Brown v. Jefferson County*, 16 Iowa, 339, assuming liability of *counties* for defective bridges. But see *Soper v. Henry County*, 26 Iowa, 264, for discussion of question.

In Pennsylvania the duty and liability as to maintaining highways and bridges in repair is statutory. *Rapho v. Moore*, 68 Pa. St. 404. In Illinois, civil townships not thus liable. *Russell v. Stuben*, 57 Ill. 35; *White v. Bond Co.*, 1871.

¹ *Blake v. St. Louis*, 40 Mo. 566, 571, *per Wagner, J.*; *Smith v. St. Joseph*, 45 Mo. 449, 1870; *Seward v. Milford*, 21 Wis. 485; *Landolt v. Norwich*, 6 Am. Law Reg. (N. S.) 388; *Leicester v. Pittsford*, 6 Vt. 245; *Raymond v.*

The ground of the action is either *positive misfeasance* on the part of the corporation, its officers, or servants, or by others under its authority, in doing acts which cause the streets to be out of repair, in which case no other notice to the corporation of the condition of the street is essential to its liability; or the ground of the action is the *neglect of the corporation* to put the streets in repair, or to remove obstructions therefrom, or to remedy causes of danger occasioned by the wrongful acts of others, in which cases notice of the condition of the street, or what is equivalent to notice, is necessary, as will presently be stated, to give to the person injured a right of action against the corporation, unless, indeed, the matter be otherwise regulated by statute.¹ It is also essential to liability that the plaintiff

Lowell, 6 Cush. 524, 534; Davenport v. Ruckman, 37 N. Y. 568, 1868; Johnson v. Haverhill, 35 N. H. 74; Ghenn v. Provincetown, 105 Mass. 313, 1870; Williams v. Clinton, 28 Conn. 264; Bacon v. Boston, 3 Cush. 174; Manderschied v. Dubuque, 29 Iowa, 73, 1870.

¹ *As to degree of care required of the plaintiff.* Fallen v. Boston, 3 Allen, 88; Gilman v. Deerfield, 15 Gray, 577; Fogg v. Nahant, 106 Mass. 278; Griffin v. Mayor, 9 N. Y. 456; 4 Comst. 349; 5 Denio, 255, and cases cited; Cobb v. Standish (woman driving), 14 Maine, 198; Combs v. Purrington (walking in carriage way), 42 Id. 332; Centralia v. Krouse, Ill. Sup. Court, 1872; S. C., 5 Ch. Leg. News, 123; Harper v. Milwaukee, 30 Wis. 305, 1872. Ripon v. Bittel, 30 Wis. 614; Requa v. Rochester, 45 N. Y. 120, 1871; Davenport v. Ruckman, 37 N. Y. 568; Beatty v. Gilmore, 16 Pa. St. 463; Seward v. Milford, 21 Wis. 485; Weisenberg v. Appleton, 26 Wis. 56; Murphy v. Dean, 101 Mass. 455, 1869; Norris v. Litchfield, 35 N. H. 271; Id. 530; Winn v. Lowell (plaintiff with poor sight), 1 Allen, 177; Lynch v. Smith (injury to child), 104 Mass. 52; Hyde v. Jamaica, 27 Vt. 443. *Infra*, sec. 790.

Plaintiff's knowledge of defect—Effect of. President, &c. v. Dusouchett, 2 Ind. 587; Farnum v. Concord, 2 N. H. 392; Reed v. Northfield, 13 Pick. 94; Wheeler v. Westport, 30 Wis. 392; Aurora v. Pulfer, 56 Ill. 270; Smith v. St. Joseph, 45 Mo. 449; Mahoney v. Metropolitan Railroad Company, 104 Mass. 73; Humphreys v. County, 56 Pa. St. 204, 1869; Durkin v. Troy, 61 Barb. 580.

The fact that with knowledge of the defect the plaintiff voluntarily attempted to pass it is not conclusive evidence of the want of due care, but is for the jury. Lyman v. Amherst, 107 Mass. 339. See, also, Whitaker v. West Boylston, 97 Mass. 273; Frost v. Waltham, 12 Allen, 85; Rindge v. Colrain, 11 Gray, 157; Pollard v. Woburn, 104 Mass. 84. But see, as to passing over defective or icy sidewalk, which might have easily have been avoided, Wilson v. Charlestown, 8 Allen, 137; Horton v. Ipswich, 12 Cush.

should have been using reasonable or ordinary care to avoid the accident, or, in other words, he must be free of any such fault or neglect on his part, as will in actions for negligence defeat a recovery. The case would be exceptional indeed when the plaintiff could properly recover vindictive, or more than actual or compensatory damages.

§ 790. Where streets have been rendered *unsafe by the direct act, order, or authority of the municipal corporation* (not acting through independent contractors, the effect of which will be considered presently), no question has ever

488; *Centralia v. Krouse*, Ill. Sup. Court, 1872, S. C., 5 Chicago Legal News, 123.

The husband's knowledge of the defect and of his wife's intention to pass over it, held not to defeat an action by the husband and wife for injuries sustained by the wife in consequence of such defect. *Street v. Holyoke*, 105 Mass. 82; S. C., 7 Am. Rep. 500.

Onus in respect to proving due care on part of plaintiff is upon him. *Law v. Crombie*, 12 Pick. 176; *Moore v. Abbott*, 32 Maine, 46; *Id.* 574; *Murdock v. Warwick*, 4 Gray, 178, and cases; *Id.* 395, 397, *per Shaw*, C. J.; *Rowell v. Lowell*, 7 Gray, 100; *Rusch v. Davenport*, 6 Iowa, 443, 1858. *Contra*, *Beatty v. Gilmore*, 16 Pa. St. 463, 1851, where the subject is carefully considered; *Erie City v. Schwingle*, 22 *Id.* 384; *Railroad Co. v. Gladmon*, 15 Wall. 401, 1872. The United States Supreme Court in this case decide that where the question is not controlled by statute, "contributory negligence" on the part of the plaintiff is a defense to be proved by the defendant.

Effect of plaintiff's violation of ordinances on his right of recovery. *Baker v. Portland*, 58 Maine, 99; 10 Am. Law Reg. (N. S.) 559, and note of Judge *Redfield*; denying *Heland v. Lowell*, 3 Allen, 104, 1862; *Steel v. Buckhardt*, 104 Mass. 59; *Sutton v. Wauwatosa*, 29 Wis. 21.

Effect of intoxication of plaintiff. *Alger v. Lowell*, 3 Allen, 402.

Measure of damages—What jury may consider. *Chicago v. Langlass*, 52 Ill. 256, 1869, and *Decatur v. Fisher*, 53 Ill. 407, 1870, denying right of jury to give exemplary damages; *McGary v. Lafayette*, 12 Rob. (La.) 668; S. C., *Id.* 674; *Id.* 4 La. An. 440; *Chicago v. Martin*, 49 Ill. 241; *Atchison v. King*, Sup. Ct. Kansas, MS. 1872, not yet reported; *Raymond v. Lowell*, 6 Cush. 524, 537, 1850; *Beecher v. Bridge Company*, 24 Conn. 491; *Masters v. Warren*, 27 *Id.* 293, 1858; *Shartle v. Minneapolis*, 17 Minn. 303, 1871, where a verdict for \$4000 was sustained; *Fuflrely v. Cincinnati*, 2 Disney (O.) 516; *Peru v. French* (married woman), 55 Ill. 318, 1870; *Canal Co. v. Graham*, 63 Pa. St. 390, 1869; *Reed v. Belfast*, 20 Maine, 246; *Nebraska City v. Campbell*, 2 Black (U. S.) 590, 1862; *Collins v. Council Bluffs*, 32 Iowa, 324, where a verdict for \$15,000 was sustained; *Cole, J.*, dissented, but dissent does not appear; *Ripon v. Bittel*, 30 Wis. 614.

been made, or can reasonably exist, as to the liability of the corporation for injuries thus produced, where the person suffering them is without fault, or was using due care.' Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its *neglect or omission* to keep the streets in repair,¹ as well as for those caused by defects occasioned by the *wrongful acts of others*;² but, as in such case, the basis of the action is

¹ *Detroit v. Corey* (sewer excavation), 9 Mich. 165, 1861; *Lloyd v. Mayor, &c.* (dangerous excavation), 1 Seld. 369, 1851; *Weet v. Brockport*, 16 N. Y. 161, note; *Chicago v. Major* (uncovered city cistern in street), 18 Ill. 349; approved, but distinguished, *Chicago v. Starr*, 42 Ill. 174, 1866, where the city was held not liable for an injury caused by the fall of a counter, leaning against a fence, on a sidewalk; *Dayton v. Pease*, 4 Ohio St. 80, 1854, in which the city was held liable for damages caused by the fall of a bridge built upon a *defective plan*, furnished by the city engineer. *Cincinnati v. Stone*, 5 Ohio St. 38, 1855; *Conrad v. Ithaca*, 16 N. Y. 158; *Wendell v. Troy*, 39 Barb. 329, 1862; *Mayor v. Sheffield*, 4 Wall. 189, 1866; *Grant v. Brooklyn* (act of a city water commissioner in opening a sewer), 41 Barb. 381, 1864; *Baltimore v. Pennington*, 15 Md. 12, 1859; *Pfau v. Reynolds*, 53 Ill. 212, 1870. *Infra*, sec. 791. *Brooks v. Somerville*, 106 Mass. 271; *Covington v. Bryant*, 7 Bush, 248.

² *Hutson v. Mayor, &c. of New York*, 9 N. Y. 163, 1853; *Hickok v. Plattsburg*, 16 N. Y. 161; *Davenport v. Ruckman*, 37 N. Y. 568, 1868; *Bloomington v. Bay*, 42 Ill. 503, 1867; *Atchison v. King*, Supreme Court of Kansas, 1872 (not yet reported). *Supra*, sec. 789. *Contra*: *Detroit v. Blakeby*, 21 Mich. 84; S. C. with note of Judge *Redfield*, 9 Am. Law Reg. (N. S.) 670.

³ *Ante*, sec. 788, and note and cases; *Hickok v. Plattsburg*, 16 N. Y. 161, note (*negligent omission* to fill up ditch which a wrongdoer had excavated in the street); *Wendell v. Troy*, 39 Barb. 329; *Requa v. Rochester*, 45 N. Y. 129, 1871; *Serrot v. Omaha City*, 1 Dillon C. C. R. 312, 1871, *Griffin v. Mayor, &c.*, 9 N. Y. (5 Seld.) 456, 1853; *Tallahassee v. Fortune*, 3 Fla. 19, 1850.

Liability for injuries received on street by the fall of an unsafe wall. In Georgia, a city corporation with the usual power to keep streets in repair and to remove buildings and obstructions thereon, was considered to have the power, which it was bound to exercise, to remove any nuisance which rendered the use of the street dangerous, such as a deep pit dug near the sidewalk, or an unsafe wall adjoining it, and it was held to be liable to a person injured by the fall of a high brick wall of a burnt house, on private property, at the line of the sidewalk, if it was negligent in the discharge of its duty to have the wall abated or made secure. The court admitted that if the wall was firm and had been thrown down by a tempest, there would be no liability. *Parker v. Macon*, 39 Ga. 725, 1869. But, in Louisiana, a

negligence, *notice* to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability; for in such cases the corporation, in the absence of a controlling enactment, is responsible only for a reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known, or ought to have been known to it, or to its officers having authority to act respecting it.¹

precisely opposite conclusion, as to the liability of a corporation for the falling of an unsafe wall, was reached in *Howe v. New Orleans*, 12 La. An. 481, 1857.

In *Jones v. New Haven*, 34 Conn. 1, 1867, it was held that a city with power to protect and regulate trees in the squares and streets, and which had by ordinance prohibited any interference by others with such trees, was liable for an *injury caused by the falling of a dead limb* which the city had *negligently* allowed to remain upon a tree in the public square. The decision, however, is rested by the court upon general principles, and not upon the duty to keep streets and ways in repair. *Jones v. New Haven*, 34 Conn. 1, 1867. *Supra*, sec. 780, sec. 788, and note on page 914 (awnings). See observation of *Hoar, J.*, in *Hixon v. Lowell*, 18 Gray, p. 68. Faulty construction of roof causing precipitation of snow and ice on traveler. *Shipley v. Fifty Asso.*, 106 Mass. 194, 1870.

A municipality is liable for an injury caused by the *fall of a liberty pole* in a street, erected by citizens years previously, though the neglect of the corporation to remove it was not willful, and it had no notice that the pole was insecure, and although it was in a part of the street which did not obstruct public travel. *Norristown v. Moyer*, 67 Pa. St. 355, 1871. *Ante*, sec. 552.

¹ *Dewey v. Detroit*, 15 Mich. 307, 1867, where the duty of street commissioners and the rule as to notice are clearly stated by *Campbell, J.*; *Mayor v. Sheffield*, 4 Wall. 189, 1866; *McGinity v. Mayor, &c. of New York*, 5 Duer, 674; *Griffin v. Mayor, &c. of New York*, 9 N. Y. 456, 1858; *Requa v. Rochester*, 45 N. Y. 129, 1871; *Serrot v. Omaha City*, 1 Dillon C. C. R. 312, 1871; *Dorlon v. Brooklyn*, 46 Barb. 504; *Doulson v. Clinton City*, 33 Iowa, 397, 1871; *Cleveland v. St. Paul*, 18 Minn. 279, 1872; *Hume v. New York*, 47 N. Y. 639, 1872; *McCarthy v. Syracuse*, 46 N. Y. 194, 1871; *Requa v. Rochester*, 45 N. Y. 129, 1871; *Rapho v. Moore*, 68 Pa. St. 404, 1871; *Centralia v. Krouse*, Ill. Sup. Court, 1872; S. C., 5 Ch. Leg. News, 123.

As to necessity of notice to city, or the lapse of sufficient time to acquire knowledge, of the unsafe condition of the street, see, also, *Ward v. Jefferson*, 24 Wis. 2; *Hubbard v. Concord*, 35 N. H. 52; *Id.* 74; *Reed v. Northfield*, 18 Pick. 94; *Worcester v. Canal Company*, 16 Pick. 541; *Hart v. Brooklyn*, 36 Barb. 226; *Weightman v. Washington*, 1 Black, 39, 62, *per Clifford, J.*; *Man-*

§ 791. Whether *the duty* of maintaining the streets in a safe condition for public travel and use is specially imposed on the corporation, or is deduced, in the manner before stated, *it rests primarily, as respects the public, upon the corporation*, and the obligation to discharge this duty cannot be evaded, suspended, or cast upon others, by any act of its own. Therefore, according to the better view, where a *dangerous excavation is made* and negligently left open (without proper lights, guards, or covering), in a traveled street or sidewalk, *by a contractor* under the corporation for building a sewer or other improvement, the corporation is liable to a person injured thereby, although it may have had no immediate control over the workmen and had even stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neglect.¹ It is immaterial, as respects the primary

chester v. Hartford, 80 Conn. 118; Howe v. Lowell, 101 Mass. 99; Bloomington v. Bay, 42 Ill. 503, 509, 1867; Canal Co. v. Graham, 68 Pa. St. 290, 1869; Decatur v. Fisher, 53 Ill. 407, 1870; Serrot v. Omaha, 1 Dillon C. C. 312, 1871; Vandyke v. Cincinnati, 1 Disney (Ohio) 532. *Infra*, sec. 795. The House of Lords, upon great consideration, have recently held that having *the means of knowledge*, and *negligently remaining ignorant*, is *equivalent* in creating a liability to *actual knowledge*. Mersey Docks v. Gibbs, 11 H. L. Cas. 687, 701; S. C., Law Rep. 1 H. L. 93, 1866; Weisenberg v. Appleton, 26 Wis. 56, 1870. Notice *not* necessary when city is in fault. Springfield v. Le Claire, 49 Ill. 476, 1866; Barton v. Syracuse, 36 N. Y. 54, 58, *per Boeckes*, J.; Chicago v. Johnson, 53 Ill. 91, 1869. Notice of defect occasioned by act of third persons essential to liability. Hume v. New York, 47 N. Y. 639, 1872.

¹ Storrs v. Utica (sewer excavation), 17 N. Y. 104, 1858, *per Comstock*, J.; Detroit v. Corey (sewer excavation), 9 Mich. 165, 1861, where the same principle was applied, and the result of Storrs v. Utica concurred in, although the city was bound to let the contract to the lowest bidder; *Campbell*, J., dissenting, on the ground, mainly, that the city, being required to let to the lowest bidder, could not itself have built the sewer, and the relation of principal and agent did not exist between the city and the contractor—the majority holding that such relation did exist, and that the contractor had, and could have, no right to make the excavation, except as the agent of the city. In an early case in California (*James v. San Francisco*, 6 Cal. 528, 1856), it was held that there was no corporate liability where the city was obliged to let the contract to the lowest bidder. See, also, *Springfield v. Le Claire*, 49 Ill. 476, 1866, following Storrs v. Utica, and disapproving *Painter v. Pittsburg*, 46 Pa. St. 221, cited *infra*; S. C., 3 Am. Law

liability of the corporation in such a case, whether it has or has not inserted such a clause in its agreement with the contractor. If, however, it has taken the precaution to obtain from the contractor an express stipulation of this character, this will give it, on being held liable (however it might otherwise be), a remedy over against him.¹ And so, on the same principle, namely, that the duty to keep the streets and sidewalks in a safe condition rests upon the corporation and cannot be surrendered or abdicated, it is liable for injuries caused by open excavations made therein, with its knowledge or consent, express or implied, by the adjoining lot owner for the purpose of an area or to obtain light and air for the basement or cellar; but in such cases the corporation has, without any express contract, if not itself in fault, a remedy over against the owner of the lot or building for whose benefit the excavation was made.²

Reg. (N. S.) 350, with useful note by Mr. (now Judge) *Mitchell*; *Chicago v. Robbins*, 2 Black, 418; S. C., 2 Am. Law Reg. (N. S.) 529, assumes the same principle; *Blake v. St. Louis*, 40 Mo. 569, 1867, which overrules, probably, *Barry v. St. Louis*, 17 Mo. 121, 1852, cited *infra*; *St. Paul v. Seitz*, 3 Minn. 297, 308, 1369, *per Flandrau, J.*; *Baltimore v. Pennington*, 15 Md. 12, 1859. Compare *Westchester v. Apple*, 35 Pa. St. 284, 1860, which, in its result and reasoning, is against the general doctrine of the courts elsewhere, and rests upon the questionable basis that a city corporation has the right to disregard its duty to the public to keep its streets in a safe condition. *Painter v. Pittsburg*, *supra*, is against the principle stated in the text, but, as pointed out by Mr. *Mitchell* in his note, the ground upon which the doctrine of the text rests "was apparently not urged in the argument, and is not noticed by the court." *Barry v. St. Louis*, 17 Mo. 121, 1852, referred to above. The latest New York case there cited is the case of *Bailey*, 2 Denio, 438, 1845, and the proposition that the city is primarily liable for the defective or dangerous condition of its streets, and should not be allowed, in executing a work attended with danger, to shift this responsibility by contract, does not appear to have been presented to the court.

¹ *Buffalo v. Holloway*, 7 N. Y. (3 Seld.) 493, 1852, affirming S. C., 14 Barb. 101. It is here held that as between the corporation and contractor, there is no implied agreement to protect the public; but is this right? See *Storrs v. Utica*, 17 N. Y. 104, 1858; *Blake v. Ferris*, 1 Seld. (N. Y.) 48; *Myers v. Snyder*, *Brightley* (Pa.) 489; *Beatty v. Gilmore*, 16 Pa. St. (4 Harris) 463, 1851; *Brooklyn v. City R. R. Co.*, 47 N. Y. 475, 1872.

² *Chicago v. Robbins*, 2 Black, 418; S. C., 4 Wall. 657; 2 Am. Law Reg. (N. S.) 529, 1862, distinguishing *Hilliard v. Richardson*, 8 Gray, 349, and overruling *Scammon v. Chicago*, 25 Ill. 424, on this point; *Rowell v. Wil-*

§ 792. There has been much controversy as to the liability of a municipal corporation for the *negligence or wrongful acts of contractors under it* in the execution of the work agreed to be performed. Ordinarily, no person other than the one immediately or actually guilty of the wrongful act is liable therefor, except upon the ground that the relation of principal and agent, or master and servant, existed between the person or corporation sought to be made liable, and the person who did the act, or was guilty of the negligence that caused the injury. In other words, the principle of *respondet superior* does not extend to cases of independent contracts, where the party for whom the work is to be done is not the *immediate superior* of those guilty of the wrongful act, and has no choice in the selection of workmen, and no control over manner of doing the work under the contract. Such is the general rule; but it is important to bear in mind that it does not apply where the contract directly requires the performance of a *work intrinsically dangerous*, however skillfully performed. In such a case, the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract.*

§ 793. Accordingly, the later and better considered cases in this country respecting streets have firmly, and, in our judgment, reasonably, established the doctrine, that where *the work contracted for necessarily constitutes an*

liams (excavation for cellar), 29 Iowa, 210, 1870, following and approving *Chicago v. Robbins*; *Wendell v. Troy*, 39 Barb. 329.

* *Blake v. Ferris*, 1 Seld. 48, 1851; *Storrs v. Utica*, 17 N. Y. 104, 1858, and note well grounded doubts of *Comstock, J.*, respecting the correctness of the application of the doctrine, so well stated in Judge *Mullett's* opinion in *Blake's Case*, to the *dangerous* work of excavating a deep hole in a public street; *Pack v. Mayor, &c.* (injury by blasting), 8 N. Y. 222, 1853; and see similar case of *Kelly v. Mayor, &c.*, 11 N. Y. 432, both approved in *Storrs v. Utica*, but distinguished; *Cincinnati v. Stone*, 5 Ohio St. 38, 1855; *Hilliard v. Richardson*, 3 Gray, 349, "and which contains," says Mr. Justice *Davis* (in *Chicago v. Robbins*, 2 Black, 418), "a most elaborate and able discussion of the doctrine of *respondet superior*," with a full review of the authorities; *Harper v. Milwaukee*, 30 Wis. 365, 1872.

* *Storrs v. Utica*, 17 N. Y. 104, 1858; *Lockwood v. Mayor, &c.*, 2 Hilton (N. Y.) 66, 1858; *Springfield v. Le Claire*, 49 Ill. 476, 1863. *Infra*, sec. 793, and cases cited.

obstruction or defect in the street of such a nature as to render it unsafe or dangerous for the purposes of public travel, unless properly guarded or protected, the employer (equally with the contractor), where the injury results *directly* from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor or his servants. In such a case the immediate author of the injury is alone liable.'

§ 794. No person, not even the adjoining owner, whether the *fee* of the street be in himself or in the public, has the right to do any act which renders the use of the street hazardous or less secure than it was left by the municipal authorities. Whoever does so, whether by excavations made in the sidewalk by the abutter,¹ or by unsafe hatchways left therein,² or by opening, or leaving open, an area-way in the pavement,³ or by undermining the street or sidewalk, or by placing unauthorized obstructions thereon, which make the use of the street unsafe or less secure,⁴ is

¹ Robbins v. Chicago, 4 Wall. 657, 679, 1866, and cases cited, *per* Clifford, J., whose statement of the principle is substantially adopted in the text. See, also, on prior appeal, 2 Black, 418, where Scammon v. Chicago, 25 Ill. 424, is on one point disapproved; Storrs v. Utica, 17 N. Y. 104, 1858; approving but distinguishing, Pack v. Mayor, &c. (injury by blasting), 8 N. Y. 282; Kelly v. Mayor, &c. (like case), 11 N. Y. 432. See, also, Cincinnati v. Stone, 5 Ohio St. 38, 1855; Goudier v. Cormack, 2 E. D. Smith (N. Y.) 254; Detroit v. Corey, 9 Mich. 165, 1861, concurring in result of Storrs v. Utica; Springfield v. Le Claire, 49 Ill. 476, 1866; compare, Clark v. Fry, 8 Ohio St. 358, 1858.

² Bush v. Johnston, 23 Pa. St. 209, 1854; Chicago v. Robbins, 2 Black, 418; S. C., 4 Wall. 657, 1866; Rowell v. Williams, 29 Iowa, 210, 1870; following Chicago v. Robbins, *supra*; Pfau v. Reynolds, 53 Ill. 212. *Ante*, sec. 521, and note.

³ Severin v. Eddy, 52 Ill. 189, 1869.

⁴ Beatty v. Gilmore, 16 Pa. St. 463, 1851; Durant v. Palmer, 5 Dutch. (N. J.) 544, 1862. *Ante*, secs. 553, 554.

⁵ Congreve v. Smith, 18 N. Y. 79, 1858; Congreve v. Morgan, 18 N. Y. 84; Harlow v. Humister, 6 Cow. (N. Y.) 189, 1826; Wood v. Mears, 12 Ind. 515, 1839; Ball v. Armstrong (building material in gutter), 10 Ib. 181;

guilty of a nuisance, and is liable to any person who, using due care, sustains any special injury therefrom; and in such cases, the person who created or continues the nuisance, is thus liable, irrespective of the question of negligence on his part.¹ In accordance with these principles, the owner of a building and lot is liable for personal injuries sustained by the breaking of a flag-stone, or defective grating forming part of the sidewalk adjoining the building and covering an excavation made without authority, and used by the owner for private purposes.² It follows that it is no answer to such an action, that the work, including the defective covering, was done for the owner at a fixed price by contractors, who agreed to do it properly. The doctrine of *respondeat superior* has no application to such a case. And because the owner is bound, at his peril, to keep the excavation covered so as to be as safe as if it had not been made, he is not discharged from liability by the fact that, having provided a sufficient covering, it was, without his knowledge, fractured or rendered unsafe by the wrongful acts of others.³

Howe v. New Orleans (unsafe burnt wall), 12 La. An. 481, 1857; Parker v. Mason (unsafe wall), 39 Geo. 725, 1869.

¹ Congreve v. Smith, 18 N. Y. 79, 1858; Congreve v. Morgan, 18 N. Y. 84; following, on this point, Dygert v. Schenck, 23 Wend. 446, and distinguished from Daniel v. Potter, 4 C. & P. 262, which involved "no question of liability for a consequential injury from a direct invasion of the street, or wrongful act." *Per Strong, J.*, 18 N. Y. 86. See, also, Irwin v. Fowler (hole scuttle in sidewalk), 5 Rob. (N. Y.) 482; Davenport v. Ruckman, 10 Bosw. 20, 37 N. Y. 568. Note, on this point, the guarded language of Mr. Justice Davis, *obiter*, in Chicago v. Robbins, 2 Black (U. S.) 418, 1862.

² Congreve v. Smith, 18 N. Y. 79, 1858; Congreve v. Morgan, 18 N. Y. 84; Dygert v. Schenck, 23 Wend. 446. Even if there be authority from the city corporation to make the excavation, this implies "that it is to be done with proper precautions to prevent accidents to travelers," and such a work is lawful only so long as it is safe. Robbins v. Chicago, 4 Wall. 657, 679, *per Clifford, J.*; S. P. in S. C., 2 Black, 418.

³ Congreve v. Morgan, 18 N. Y. 84, 1858. The cases in New York upon which the doctrine of the text rests are denied to be sound by the Supreme Court of Michigan, in the recent case of Fisher v. Thirkell, 21 Mich. 1, 1870. In that case the owner of a building, who for his own advantage and convenience had made without any express municipal assent (*ante*, sec. 553), a scuttle or hole in the sidewalk, opening into a vault connecting with the

§ 795. The ultimate liability, however, in such cases, is upon the *author or continuer of the nuisance*; but if the party injured elects to proceed against the municipal corporation for failing in its duty to keep the streets and sidewalks in a safe condition for public travel, and there is no statute dispensing with notice as a condition of liability, he must show notice to the corporation of the obstruction or defect, or at least, neglect of duty in not ascertaining it.

cellar, was held not to be liable for an accident to a traveler, caused by its being out of repair, it appearing that it was safely constructed originally, and that it was allowed to become out of repair by the tenant under a lease which did not contain any covenant on the part of the lessor to keep the premises in repair. The court regard such excavations properly made and guarded as lawful unless made in contravention of some law or authorized municipal regulation, and to draw after them no such consequence as that the party making them shall be responsible for all injuries resulting from the want of entire safety. Since these are made for the exclusive benefit of the owner of the building, the author sees nothing unreasonable in the doctrine that he is bound to see that they are kept in repair, and do not become nuisances by becoming dangerous. *Ante*, sec. 554. There may be the additional liability of the tenant, and of the municipality in proper cases.

The owner of a building is not liable for defects in sidewalk occasioned by *natural causes*, as by accumulations of *ice and snow* thereon. *Kirby v. Market Association*, 14 Gray, 249; *supra*, sec. 788, and note.

Defects in ways caused by *railroad companies*. *Infra*, sec. 796.

¹ *Supra*, sec. 790; *ante*, sec. 572; *McGinity v. Mayor, &c. of New York*, 5 Duer, 674, 1856; *Griffin v. Mayor, &c. of New York*, 9 N. Y. (5 Seld.) 456; *Portland v. Richardson*, 54 Maine, 46, 1866; *Veazie v. Railroad Company*, 49 *Ib.* 119; *Chicago v. Robbins*, 2 Black (U. S.) 418, 1862; S. C., 4 Wall. 657, 1866; *Durant v. Palmer*, 4 Dutch. (N. J.) 544, 1862. No liability by owner of land if in the use of his land he places logs outside of the *legal* highway, but within the road as fenced. *Harlow v. Humiston*, 6 Cow. 189, 1826.

Liability for act of agent or servant: *Harlow v. Humiston*, 6 Cow. 189, 1826; *Samyn v. McCloskey*, 2 Ohio St. 536, 1853.

Liability as between owner and tenant: *Durant v. Palmer*, 5 Dutch (N. J.) 544, 1862; *Shipley v. 50 Associates*, 106 Mass. 194, 1870; *Milford v. Holbrook*, 9 Allen, 17; *Lowell v. Spaulding*, 4 Cush. 277, 1849; *Lowell v. Short*, *Ib.* 275; *Kirby v. Market Association*, 14 Gray, 249, 1859; *Stephani v. Brown*, 40 Ill. 428, 1866; *Fisher v. Thirkell*, 21 Mich. 1, 1870. *Supra*, sec. 788, note, p. 914.

Liability of author of a dangerous and unguarded excavations on his own land near a frequented sidewalk or street: *Norwich v. Breed*, 30 Conn. 535, 1862. Compare *Howland v. Vincent*, 10 Met. 371; *Hardcastle v. Railroad Company*, 4 Hurlst. & Norm. 67; *Hounsel v. Smyth*, 7 Com. B. (N. S.) 729; *Manderschid v. Dubuque*, 29 Iowa, 73, 1870. *Ante*, sec. 780. *Parker*

If the person injured fail in his action against the municipality, this is no bar to an action by him against the author of the nuisance.' If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrongdoer, as between itself and the author of the nuisance ;' and if the latter had *notice of the pendency of the action against the municipality*, and could have defended it, he has been held to be concluded as to the existence of the defect or nuisance in the street, and as to the liability of the corporation to the plaintiff in consequence thereof, and as to the amount of damage or injury it occasioned.' But although duly notified he is not, says the Supreme Court of the United States, "estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault that the accident happened."'

§ 796. Towns and cities in the New England States are obliged, as we have seen, by statute, to keep their highways

v. Mason (unsafe wall), 89 Ga. 725, 1869; *Howe v. New Orleans* (unsafe wall), 12 La. An. 481; *Rowell v. Williams*, 29 Iowa, 210. No liability against the owner for maintaining an area cover in a highway where this existed at the time of the dedication of the highway to the public. *Fisher v. Prowse*, 110 Eng. Com. Law, 770, and cases reviewed by *Blackburn*, J. See *Beach v. Frankenberger*, 4 W. Va. 712. *Ante*, p. 914, note.

¹ *Severin v. Eddy*, 52 Ill. 189, 1869.

² *Chicago v. Robbins*, 4 Wall. 657, 1866; S. C., 2 Black, 418; *Portland v. Richardson*, 54 Maine, 46, 1866, and cases cited; *Milford v. Holbrook*, 9 Allen, 17; *Brooklyn v. City R. R. Co.*, 47 N. Y. 475, 1872.

³ *Boston v. Worthington*, 10 Gray, 496, 1859; *Milford v. Holbrook*, 9 Allen, 17; *Portland v. Richardson*, 54 Maine, 46, 1866; *Veazie v. Railroad Company*, 49 *Ib.* 119; *Mayor, &c. of Troy v. Troy, &c. R. R. Co.*, 49 N. Y. 657, 1872; *Brooklyn v. City R. R. Co.*, 475, and cases cited, *Ib.* p. 481.

⁴ *Chicago v. Robbins*, 2 Black (U. S.) 418, 1863, *per Davis, J.*; S. C., 4 Wall. 657, 1866, in both of which it is held that it is not necessary that the notice should have been express or formal. Effect of record in former action: *King v. Chase*, 15 N. H. 1; *Littleton v. Richardson*, 34 N. H. 179, 187, 1856, and cases cited, and where the subject is fully examined; *Boston v. Worthington*, 10 Gray, 496; *Brooklyn v. City R. R. Co.*, 47 N. Y. 475, 1872; *Westchester v. Apple*, 35 Pa. St. 584; *Portland v. Richardson*, 54 Maine, 46, 1866; *Mayor, &c. of Troy v. Troy R. R. Co.* *supra*.

and streets in repair ;¹ and *railroad companies* in the same have frequently been authorized by law to *construct their roads over public highways and streets*, the effect of which may be to cause the latter to be out of repair. Under these circumstances, the question arises if a person suffers damage by reason of a defective highway or street thus occasioned, who is responsible—the railroad company which caused the defect, or the town or city which is charged with the general duty of maintaining and keeping in repair the public ways? The course of decision in the New England states is to hold the town or city *primarily* responsible to the person sustaining the injury, thus compelling it, when held liable, to seek indemnity from the railroad company.² In such a case, the railroad company is liable to the town or city for its neglect, or that of its workmen, and for the neglect of the workmen of a contractor who had agreed to construct the railroad for a stipulated sum. But the town or city can only recover of the railroad company *single damages*, although it had to pay double damages ; nor can

¹ *Ante*, secs. 786–788.

² *Phillips v. Veazie*, 40 Maine, 96, 1855; *Currier v. Lowell*, 16 Pick. 17, 1834, cited *infra*; *Elliott v. Concord*, 7 Foster, 204, 1853; *Batty v. Duxbury*, 24 Vt. 155, 1852; *Willard v. Newbury*, 22 Vt. 458, 1850; *Barber v. Essex*, 27 Vt. 62; *Roxbury v. Railroad Company*, 6 Cush. 490; *Redfield on Railways*, 391. *State v. Gorham*, 37 Maine, 451, holds the same doctrine as to *bridges*. See further, on this subject: *Ante*, secs. 560, 561, and note; also, sec. 747, note; *Kittredge v. Milwaukee*, 26 Wis. 46. As to liability for defects at the crossing: *Davis v. Leominster*, 1 Allen, 182. *Supra*, sec. 785, n.

The traveler may, of course, elect to proceed at once against the railroad company if he chooses. *Lowell v. Railroad Company*, 23 Pick. 24, 31; *Elliott v. Concord*, 7 Fost. (N. H.) 204, 1853, construing statute. See, also, *Willard v. Newbury*, 22 Vt. 458; *Batty v. Duxbury*, 24 Vt. 155. *Mandamus* held to lie to compel railroad company to level and grade the street so as to render the use thereof at the railroad crossing safe and convenient for the public. *Indianapolis, &c. R. R. Co. v. State*, 37 Ind. 489, 1871.

In Massachusetts a town is not responsible for injuries sustained by a traveler on a highway by the *running of the cars* of a railroad company across the highway. *Vinal v. Dorchester*, 7 Gray, 421, 1856. The case of *Currier v. Lowell*, 16 Pick. 170, carries the liability of towns to its extreme limits. *Ib. per Shaw*, C. J. Nor by reason of a *telegraph post* erected by authority of the law within the limits of the highway. *Young v. Yarmouth*, 9 Gray, 386, 1857. *Ante*, sec. 552.

it recover from the railroad company the *costs and expenses* of the action brought by the traveler against it, unless the action was defended at the request of the railroad company, or for its benefit.¹

§ 797. In this connection may be considered the liability of municipal corporations *for injuries to private property in consequence of being overflowed with water* caused by improvements made, or work done, upon the streets, under their authority. And here it is important to distinguish between *natural streams* flowing in channels between defined and actual banks, and *surface water*, caused by rain or melting snow, for the law relating to them is very different, and the powers of the municipality much greater with respect to the latter than the former.* Assuming the stream to be of the former character, and that the municipality is without any valid legislative powers changing what would otherwise be the legal rights of the parties, its authorities under the general power to grade and improve streets, or construct public improvements beneficial to it, cannot deprive others of their property rights in the watercourse, or injure them by badly constructed and insufficient culverts or passage ways obstructing the free flow of the water, without being liable therefor.²

¹ *Lowell v. Railroad Company*, 23 Pick. 24, 1839, growing out of *Currier v. Lowell*, 16 Pick. 170, 1839. S. P. *Lowell v. Short*, 4 Cusb. 275, 1849; *Same v. Spaulding*, *Id.* 277; *Willard v. Newbury*, 22 Vt. 458. See, on this subject, *Rex v. Inhabitants of St. George, &c.*, 3 Campb. 222, 1812; *Rex v. Liverpool*, 3 East, 86, 1802; *Littleton v. Richardson*, 84 N. H. 179, 1856. *Remedy over* against author of nuisance. *Ante*, secs. 794, 795.

* 3 Kent Com. 439, 440; 2 Washb. Real Prop. 64, pl. 40; 1 West. Jur. 12, Article on "Surface Waters." See *Ross v. St. Charles*, Supreme Court of Missouri, 1872, 49 Mo. 509, as to "living" and "permanent" stream. *Flagg v. Worcester*, 13 Gray, 601, 607, 1859, and cases there cited by *Merrick, J.*; *Goodale v. Tuttle*, 29 N. Y. 459, 1864; *Briscoe v. Drought*, 11 Ir. C. L. R. 250; *Wood v. Ward*, 8 Exch. (W. H. & G.) 748; *Hoyt v. Hudson*, 27 Wis. 656.

² *Baron v. Baltimore*, 2 Am. Jur. 203, approved in *Stetson v. Faxon*, 19 Pick. 147, 158, 1837, and see, also, *Thayer v. Boston*, *Id.* 510; *Gardner v. Newburgh* (diverting watercourse), 2 Johns. Ch. 162, 1816. *Ante*, sec. 97, note. *Supra*, sec. 780.

Insufficient or defective water-ways or culverts. *Haynes v. Burlington*, 32 Vt. 350, 1865; *Wheeler v. Worcester*, 10 Allen. 591, 1865, where *Coll. J.*

§ 798. As to *surface water*, quite different principles apply. This the law very largely regards (as Lord Tenterden phrases it) as a common enemy, which every proprietor may fight or get rid of as best he may. The reports contain many instances in which it has been sought to make municipal corporations liable for damages caused, in various ways, by surface water, to private property. Reference will first be made to cases in which the work of grading or improving the streets has been the cause of the injury. Where the damage has resulted solely as a consequence of the proper execution of a legal power by the corporation, it falls within the principle already mentioned,¹ and there is no implied liability therefor. Authority to establish grades for streets, and to graduate them accordingly, involves the right to make changes in the surface of the ground, which may affect injuriously the adjacent property owners; but where the *power* is not exceeded there is no liability, unless created by statute, and then only in the mode and to the extent provided, for the consequences resulting from its being exercised and properly carried into execution. On the one hand, the owner of the property may take such measures as he deems expedient to keep surface water off from him or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may

states carefully some of the duties of a municipal corporation in bridging a watercourse. *Parker v. Lowell*, 11 Gray, 353, 1858; *Perry v. Worcester* (action of tort for back water), 6 Gray, 544, 1856; *Sprague v. Worcester*, 13 Gray, 193, 1859, same bridge as in case last cited; *Lawrence v. Fairhaven*, 5 Gray, 110; *Talbot v. Whipple*, 7 Gray, 122; *Rochester Lead Company v. Rochester* (poorly constructed culvert), 3 Comst. 463, 1850, explained by *Denio*, C. J., in *Mills v. Brooklyn*, 32 N. Y. 489, 1865; S. C., 5 Am. Law Reg. (N. S.) 33 and note; *Ross v. Madison* (insufficient culvert), 1 Ind. 281, 1848; S. C., 3 *Id.* 236, 1851; *Dayton v. Pease*, 4 Ohio St. 80, 1854; *Mayor v. Randolph*, 4 Watts & Serg. 514; *Ross v. St. Charles* (back water), *supra*. Good faith and honest exercise of judgment are no defence in an action caused by inadequate artificial water-way. *Perry v. Worcester*, *supra*. Liability does not extend to *extraordinary* freshets. *Sprague v. Worcester*, *supra*. Except such as, looking at the history of the stream in this respect, may be "reasonably expected occasionally to occur." *Per Chancellor Walworth, Mayor, &c. v. Bailey*, 2 Denio, 433, followed by *Madison v. Ross*, 3 Ind. 236, 1851.

¹ *Ante*, secs. 781, 782, 783. *Post*, sec. 802.

exercise their powers in respect to the graduation, improvement and repair of streets without being liable for the consequential damages caused by surface water to adjacent property.

§ 799. It is clear that there is no liability on the part of a municipal corporation for *not exercising* powers it may possess to improve streets, and, as part of such improvement, to construct gutters or provide other means of drainage for surface waters so as to prevent them from flowing upon the adjoining lots.¹ And even when the work of graduating the streets has been entered upon, there is not, ordinarily, if ever, any liability to the adjoining owner arising merely from the non-action of the corporation in not providing means for keeping surface waters from property situate below the established grade of the street.² There are, indeed, cases which go further, and assert that there is no such liability where, in making improvements upon streets or elsewhere, *authorized by law*, surface waters are purposely turned from one's own land to that of another—from the street directly upon the adjacent property owner.³ We agree to the doctrine that the municipality is not bound to protect from surface water those who may be so

¹ *Wilson v. Mayor, &c. of New York*, 1 Denio, 595, 1845, cited *infra*, sec. 800; *Mills v. Brooklyn*, 32 N. Y. 489, 1865; *Flagg v. Worcester*, 13 Gray, 601, 1859; *Roll v. Augusta*, 34 Geo. 326, 1866; *Carr v. Northern Liberties*, 35 Pa. St. 324, 1860; *City Council v. Gilmer*, 33 Ala. 116, 1858; S. C., 26 *Id.* 665; *Atchison v. Challiss*, 9 and 10 Kansas, not yet reported—overruling *Leavenworth v. Casey*, *McCahon* (Kansas), 124; *Bennett v. New Orleans* (omission to repair draining machine), 14 La. An. 130, 1859; *supra*, sec. 753; *Aurora v. Pulfer*, 56 Ill. 270, 1870.

² Same authorities; *supra*, secs. 753, 783. Compare *Aurora v. Reed*, 57 Ill. 80.

³ *Turner v. Darmouth*, 13 Allen, 291, 1866; *Greeley v. Railroad Company* 53 Maine, 200, 1865; *Dickinson v. Worcester*, 7 Allen, 19, 1863; *Gannon v. Hargadon*, 10 Allen, 106; *Flagg v. Worcester*, 13 Gray, 601; *Franklin v. Fisk*, 13 Allen, 211; *Barry v. Lowell*, 8 Allen, 127; *Parks v. Newburyport*, 10 Gray, 28; *Bangor v. Lansil*, 51 Maine, 521, 1863; compare, *Brine v. Railway Company*, 110 Eng. Com. Law, 402, 1862; *Pennoyer v. Detroit*, 8 Mich. 534, 1860; *Pettigrew v. Evansville*, 25 Wis. 223, 1870; *Hoyt v. Hudson*, 27 Wis. 656, 1871; *Lambar v. St. Louis*, 15 Mo. 610, 1852; *Adams v. Walker*, 34 Conn. 466, 1867; *Commissioners v. Wood*, 10 Pa. St. 93, 1848; *Ellis v. Iowa City*, 29 Iowa, 229, 1870; *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Reed*, 57 Ill. 30; *Aurora v. Gillett*, 56 Ill. 132; *Young v. Leedom*, 67 Pa. St. 351, 1871

unfortunate as to own property below the level of the street ; nor is the duty a perfect one, to adopt a system or mode of drainage which will have this effect ; and if one be adopted. there is no liability except as to ministerial duties in connection therewith. It is possible there may be no middle ground, but we are unable to assent to the doctrine, that by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the legal right intentionally to divert the water therefrom as a mode of protecting the streets, and discharging it, by artificial means, in increased quantities, and with collected force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner.¹

§ 800 If, in consequence of filling streets and cross streets to the established grade line, water is *collected in ponds or pools* upon the adjoining lots which are thus brought below the level of the streets, the corporation is not liable for damages thereby occasioned,² not even, it has been

¹ See and compare on this point, in addition to the cases last referred to, *Flagg v. Worcester*, 13 Gray, 601, 1859, and *Livingston v. McDonald*, 21 Iowa, 160, 1866; *Bentz v. Armstrong*, 8 Watts & Serg. 40, 1844, remarks of *Kennedy, J.*; *Brine v. Railway Company*, 110 Eng. Com. Law, 402; *infra*, secs. 860, 802; *Foot v. Bronson*, 4 Lansing (N. Y.) 47, 1871.

Under the Municipal Act of Upper Canada, which provides for "compensation to the owners of real property taken or used by the corporation in the exercise of its powers in respect to streets, drains, &c., for damages necessarily resulting from the exercise of such powers," it is not in the power of the municipal corporation to drain a highway upon the adjoining proprietor without making compensation. *Brown v. Sarnia*, 11 Upper Can. Q. B. 87. *Id.* 125; *Perdue v. Corporation*, 25 *Id.* 61; *Harr. Munic. Man.* (2d ed.) 259. But there is no liability for injuries from natural causes, such as violent and unusual storms. *Snook v. Brantford*, 14 *Id.* 255.

The power to repair highways must be reasonably exercised. *Reed v. City of Hamilton*, 5 U. C. C. P. 269; *Croft v. Peterborough*, *Id.* 35.

² *Clark v. Wilmington*, 5 Harring. (Del.) 243, 1849; *supra*, sec. 783. *Contra.* *Weeks v. Milwaukee*, 10 Wis. 242, 1860; modified in *Smith v. Milwaukee*, 18 Wis. 63, 1864, and resting on doubtful grounds. See, also, *Nevins v. Peoria*, 41 Ill. 503. The case of *Hudson v. Hoyt*, 27 Wis. 656, 1871, holds, in a carefully prepared opinion by *Dixon, C. J.*, reviewing and classifying the cases, that where the passage of surface water through a ravine or otherwise is obstructed by the corporation in the exercise of its power to grade and improve streets, the adjacent land owner, injured in consequence, has no action against the municipality. And such is undoubt-

held, where it would have been practicable, in the judicial judgment, to have prevented it by the construction of tunnels, openings, or drains; but upon the last point the cases are conflicting.¹

§ 801. Since the duty of *providing drainage or sewerage for surface water* is in its nature *judicial or quasi judicial*, requiring the exercise of judgment as to the time when, and the mode in which, it shall be undertaken, the claims of respective localities as to order of commencement when it cannot all be effected at once, and the best plan which the means at the disposal of the corporation renders it practicable to adopt, it follows, upon legal principles, that the corporation is not liable to a civil action for *wholly failing to provide drainage or sewerage*,² nor, probably, for

edly the correct *general* rule, though it is suggested that there *may* be an exception in the case of a hilly region drained through a narrow gorge. *Bowlsby v. Spear*, 31 N. J. Law (2 Vroom), 351; *Hoyt v. Hudson*, *supra*. But this could at most, it is believed, make it the duty of the corporation to provide, if practicable, a culvert.

¹ *Wilson v. Mayor, &c. of New York*, 1 Denio, 595, is the leading case holding this doctrine. It is expressly approved by *Denio*, C. J., in *Mills v. Brooklyn*, 32 N. Y. 489, 1865, who says that it always has been referred to (in that state) as an accurate exposition of the law. *S. P. Clark v. Wilmington*, 5 Harring. (Del.) 243, 1849; *supra*, sec. 783. *Contra*: *Cotes v. Davenport*, 9 Iowa, 227, 1859; approved, *Templin v. Iowa City*, 14 *Ib.* 59; *Weeks v. Milwaukee*, cited in preceding note; *Nevins v. Peoria*, 41 Ill. 502, 1866, where *Laurence*, J., disapproves of *Wilson v. Mayor*, *supra*, but admits that the rule there declared has been quite generally adopted; *Mears v. Wilmington*, 9 Ire. (Law) 73, 82, also disapproves of *Wilson v. Mayor, &c.*, on the ground that it overlooks the implied condition that the work should be done properly. But who is to *judge* whether it would have been practicable to have provided for the drainage of the lots in making the improvement—the city authorities, as maintained in the New York cases, or the judicial tribunals? See *Brine v. Railway Company*, 110 Eng. Com. Law, 402 1862; *supra*, sec. 790; *Brown v. Sarnia*, 11 Upper Canada Q. B. 87; *supra*, sec. 781, n.; *Perdue v. Corporation*, 25 *Ib.* 261; *Harper v. Milwaukee*, 30 Wis. 365, 1872; *Hoyt v. Hudson*, 27 Wis. 656.

² *Mills v. Brooklyn*, 32 N. Y. 489, 1865; S. C., 5 Am. Law Reg. (N. S.) 83, with note of Mr. (now Judge) *Mitchell*; *Wilson v. Mayor, &c.*, 1 Denio, 595; *supra*, secs. 753, 755, note; *Child v. Boston*, 4 Allen, 41, 52, 1862; *Carr v. Northern Liberties*, 35 Pa. St. 324, 1860; *City Council v. Gilmer*, 23 Ala. 116, 1858; S. C., 26 *Ib.* 665; *Atchison v. Challiss*, Supreme Court

any defect or want of efficiency in the plan of sewerage or drainage adopted ;' nor, according to the prevailing and perhaps correct view, for the *insufficient size or want of capacity of gutters or sewers* for the purpose intended, particularly if the adjoining property is not in any worse position than if no gutters or sewers whatever had been constructed.²

of Kansas, MS. 1872 (9 or 10 Kansas) overruling *Leavenworth v. Casey*, McCahon (Kansas) R. 124; *McCarthy v. Syracuse*, 46 N. Y. 194, 1871.

¹ *Ib.* *Child v. Boston*, 4 Allen, 41, 1862, cited *infra*, sec. 802, which was three times argued. The admirable opinion of Mr. Justice Hoar illustrates several phases of the question of corporate liability. "Upon mature deliberation, we are all of opinion that the defendants (the city of Boston) are not responsible for any defect or want of efficiency in the plan of drainage adopted." *Ib.* p. 51. The corporation is not responsible for any error or want of judgment upon which its system of drainage was devised. *Per Denio*, C. J., in *Mills v. Brooklyn*, 82 N. Y. 489, 1865, who distinguishes such a case from one where there is a want of skill in constructing the work when entered upon. *McCarthy v. Syracuse*, 46 N. Y. 194, 1871. See *supra*, sec. 781, note; *infra*, sec. 802.

² Same authorities, particularly *Mills v. Brooklyn*, *supra*, which was a case purely where the drain or sewer was *not sufficiently large*, and the corporation was held not liable. See, also, *Barry v. Lowell*, 8 Allen, 127, 1864, distinguished from *Child v. Boston*, *supra*; *Flagg v. Worcester*, 13 Gray, 601, 1859; note to *Mills v. Brooklyn*, 5 Am. Law Reg. (N. S.) 33, 44; *Atchison v. Challiss*, above cited; *Dermont v. Detroit*, 4 Mich. (Gibbs) 435, 1857. *Judge v. Meriden*, 38 Conn. 90, 1871, note dissent of the Chief Justice; *McCarthy v. Syracuse*, 46 N. Y. 194, 1871. In *Carr v. Northern Liberties*, 35 Pa. St. 324, 1860, it was held that a municipal corporation was not liable for neglecting to provide a sufficient number of inlets to its sewers (constructed for drainage purposes), which were sufficient when constructed, but which have ceased to be so in consequence of the greater extent of territory since graded and built upon. Same principle, *Grant v. Erie*, 69 Pa. St. 420, 1871.

In Canada, where a drain was so unskillfully constructed by the corporation contractors as not to carry off water, but to carry filth from the main sewer into plaintiff's cellar, which for months he had endured, it was held that he was entitled to sue the corporation for the recovery of substantial damages, though no by-law for the making of the drain was proved. *Reeves v. Toronto*, 21 Up. Can. Q. B. 160. So if in the construction of a drain by corporation contractors, quantities of earth be thrown up and permitted to continue, so that in times of rain, mud and water were driven on plaintiff's messuage, he was held entitled to sue the corporation for damages. *Farrell v. The Mayor, &c. of London*, 12 U. C. Q. B. 347; sec. also, *Perdue v. The Corporation, &c. of Chinguacousy*, 25 U. C. Q. B. 61. As to power to compel drainage and assess cost thereof under

§ 802. But where the duty as respects drains and sewers ceases to be judicial, or *quasi* judicial, and becomes ministerial, then, although there be no statute giving the action, a municipal corporation is liable for the negligent discharge or the negligent omission to discharge such duty, resulting in an injury to others.¹ Therefore, in accordance with this distinction between judicial and ministerial duties (a distinction plain in theory, but oftentimes difficult of application to particular cases), a municipal corporation is liable for negligence in the ministerial duty to keep its sewers (which it alone has the power to control and keep in order) in repair as respects persons whose estates are connected therewith by private drains, in consequence of which such persons sustain injuries which would have been avoided had the sewers been kept in a proper condition.² If the sewer is negligently permitted to become obstructed or filled up so that it causes the water to back-flow into cellars connected with it, there is a liability therefor on the part of

Canadian Municipal Act: *In re McCutcheon*, 22 Up. Can. Q. B. 613; *Morse v. Haynes*, *Id.* 107.

¹ *Barton v. Syracuse*, 36 N. Y. 54, 1867; 37 Barb. 392; *Child v. Boston*, 4 Allen (Mass.) 41, 1862; *Emery v. Lowell*, 104 Mass. 13, 1870; *McGregor (city of) v. Boyle*, 84 Iowa, 268, 1872. Compare *Dermont v. Detroit*, 4 Mich. 435, 1857; *City Council v. Gilmer*, 33 Ala. 116, 1858; S. C., 26 *Id.* 665; *Jones v. New Haven*, 34 Conn. 1; *Logansport v. Wright*, 25 Ind. 512; *supra*, sec. 753. Ministerial duties, as distinguished from those which are discretionary or *quasi* judicial, are such as are "absolute, certain, and imperative." *Per Denio*, C. J., in *Mills v. Brooklyn*, 32 N. Y. 489, 1865; *Lewenthal v. New York*, 5 Lans. 532. See *Donohue v. New York*, 3 Daly (N. Y.) 165; *McCarthy v. Syracuse*, 46 N. Y. 194, 1871. All acts involved in the necessary performance of a duty prescribed by ordinance are ministerial. *Danbury, &c. Railroad Company v. Norwalk*, 37 Conn. 109, 1870; *Amy v. Supervisors*, 1 Wall. 136, 1870. *Ante*, sec. 176, note, as to *personal liability* of officers for torts.

² *Child v. Boston*, 4 Allen. 41, 1862; *supra*, sec. 778. There is considered to be no liability in Massachusetts on the part of a city for failing to keep a public cesspool and sewer in repair, in consequence of which waste water accumulates and flows into neighboring cellars *not connected with the sewer*. *Barry v. Lowell*, 8 Allen, 127, 1864, distinguished from *Child v. Boston*, *supra*. But where the reason on which this distinction rests does not apply and where the work would be regarded as a corporate one, the duty to prevent it becoming a nuisance might be such, we think, as to impose a liability on the corporation for injuries which would not have been suffered had it been kept in order. *Supra*, sec. 780.

the municipal corporation having the control of it, and which is bound "to preserve and keep in repair erections it has constructed, so that they shall not become a source of nuisance" to others.¹ The work of constructing gutters, drains, and sewers, is ministerial, and when, as is usually the case, the undertaking is a corporate one, the corporation is responsible in a civil action for damages caused by the careless or unskillful manner of performing the work.²

The principle, indeed, is a general one, that while there is no implied liability for damages necessarily occasioned by the construction of any municipal improvement authorized by law, yet if the work thus authorized be not executed in a proper or skillful manner, there will arise a common law liability for all damages, not necessarily incident to the work, and which are chargeable to the unskillful or improper manner of executing it.³

And here, according to its plan, this work is brought

¹ *Barton v. Syracuse*, 36 N. Y. 54, 1867; *Mayor, &c. of New York v. Furze*, 3 Hill (N. Y.) 612, 1842, explained in *Wilson v. Mayor, &c. of New York*, 1 Denio, 595, 1845, and in *Mills v. Brooklyn*, 32 N. Y. 489, 1865, and the ground of the decision stated as in the text. City cannot discharge drainage into a mill-race owned by others. *Columbus v. Woolen Company*, 33 Ind. 435, 1870; but may connect its sewerage with any natural flow of water, and is not liable for the falling in of a sewer (with which it has connected its own) which it did not build, and which, being on private property, it has no right to enter to repair, and where the injury is not shown to have resulted from the connection of the city's sewer with the old sewer, whose fall caused the injury. *Munn v. Pittsburg*, 40 Pa. St. 364, 1861. A municipal corporation cannot discharge its sewers upon private property; and where a city caused its sewers to empty into a small watercourse running through the plaintiff's property, thereby conducting to and emptying upon such property a greater body of water than the natural flow through the watercourse, to the injury of the property owner, it is *prima facie* liable therefor. *O'Brien v. St. Paul*, 18 Minn. 176, 1872. Liability of city for drain at end of wharf. *Richardson v. Boston*, 19 How. 270.

² *Supra*, secs. 753, 779, 780, 781. In *Child v. Boston*, 4 Allen, 41, 1862, it is held that the mayor and aldermen of Boston, in building sewers, act as public statutory officers, and not as agents of the city; but generally the power to construct sewers is private or corporate. This is very clearly explained by *Manning, J.*, in *Detroit v. Corey*, 9 Mich. 165, 194, 1861; *Mills v. Brooklyn*, 32 N. Y. 489, 1865; *Dermont v. Detroit*, 4 Mich. 485, 1857; *Ross v. Madison*, 1 Ind. 281; *Commissioners v. Wood*, 10 Pa. St. 93, 95. *Ante*, sec. 33.

³ Same authorities. *Supra*, secs. 779, 781. *Brine v. Railway Company*,

to a close. Mr. WILLCOCK, in concluding a similar treatise upon the Municipal Corporations of England, before the Reform Act, disgusted with their petty disputes, intrigues, and corruptions, declared that they had long since ceased to have any beneficial operation, and added: "I have traveled through this work as a merchant from Medina to Damascus, a weary waste of way: there is as little to gratify the mind in the investigation, as to please the eye in the desert." Such has not been our experience in the present work. On the contrary, the extensive field over which we have just passed has presented at every turn new and interesting subjects for contemplation.

Our municipalities, in their creation and operations, stand closely related both to the Government and to the Law. They offer to the Legislator and the Jurist questions of perplexing intricacy and deepest moment. How thoroughly our municipal institutions are wrought into the frame work of our government and administration, how important the functions they are made habitually to perform, how closely in the exercise of their diversified powers, and in the discharge of their varied duties, they touch the daily life and affect the most important interests of the citizen, cannot fail to impress even the most inattentive observer. They are quickened by the spirit of the times, and in all their multifarious purposes they illustrate its activity and enterprise. Walled towns belong to a past age. The violence and insecurity of that age have passed away, but in their place, our chartered corporations, particularly our large cities, are encountering the perils, not less alarming,

110 Eng. Com. Law, 402, 411, *per Crompton, J.*, cited, 11 House of Lords Cases, 714; *Sprague v. Worcester*, 13 Gray, 193, 1859, *per Shaw, C. J.*; *Perry v. Worcester*, 6 Gray, 544, 1856, and cases cited; *Proprietors of Locks, &c. v. Lowell*, 7 Gray, 223; *Flagg v. Worcester*, 13 Gray, 601, 605; *McGregor v. Boyle*, 34 Iowa, 268, 1872; *Emery v. Lowell*, 104 Mass. 13, 1870; *City Council v. Gilmer*, 33 Ala. 116, 1858; S. C., 26 *Id.* 665; *Barton v. Syracuse*, 36 N. Y. 54, 1867; *Conrad v. Ithaca*, 11 N. Y. 158; *Cowley v. Sunderland* (mayor of), 6 H. & N. 565, 1861. Further as to the right to maintain actions against bodies executing public works, under legislative authority, for the improper mode in which their powers have been exercised, see opinion of *Blackburn, J.*, in *Mersey Docks Cases*, 11 House of Lords Cases, 713, *et seq.*; *Broom Com. on Com. Law* (4th ed.) 660, where the recent English cases are cited.

of corruption and fraud on a gigantic scale, engendered by the large revenues and official patronage at their disposal, and the disinclination, often the steady refusal, of the substantial citizens to take a controlling part in the management of municipal affairs.

How best to govern our cities is yet an unsolved problem in legislation ; but it is clear, that for many of the excesses to which municipal bodies are prone the Courts afford the most effectual, if not the only, remedy ; and it is impossible to rise from the survey of the authority of the judicial tribunals over them, to enforce their rights on the one hand, and to enforce rights against them on the other, without profound admiration for the learning and conservative wisdom of the judges as displayed in the recorded judgments, which we have sought to photograph in these pages.

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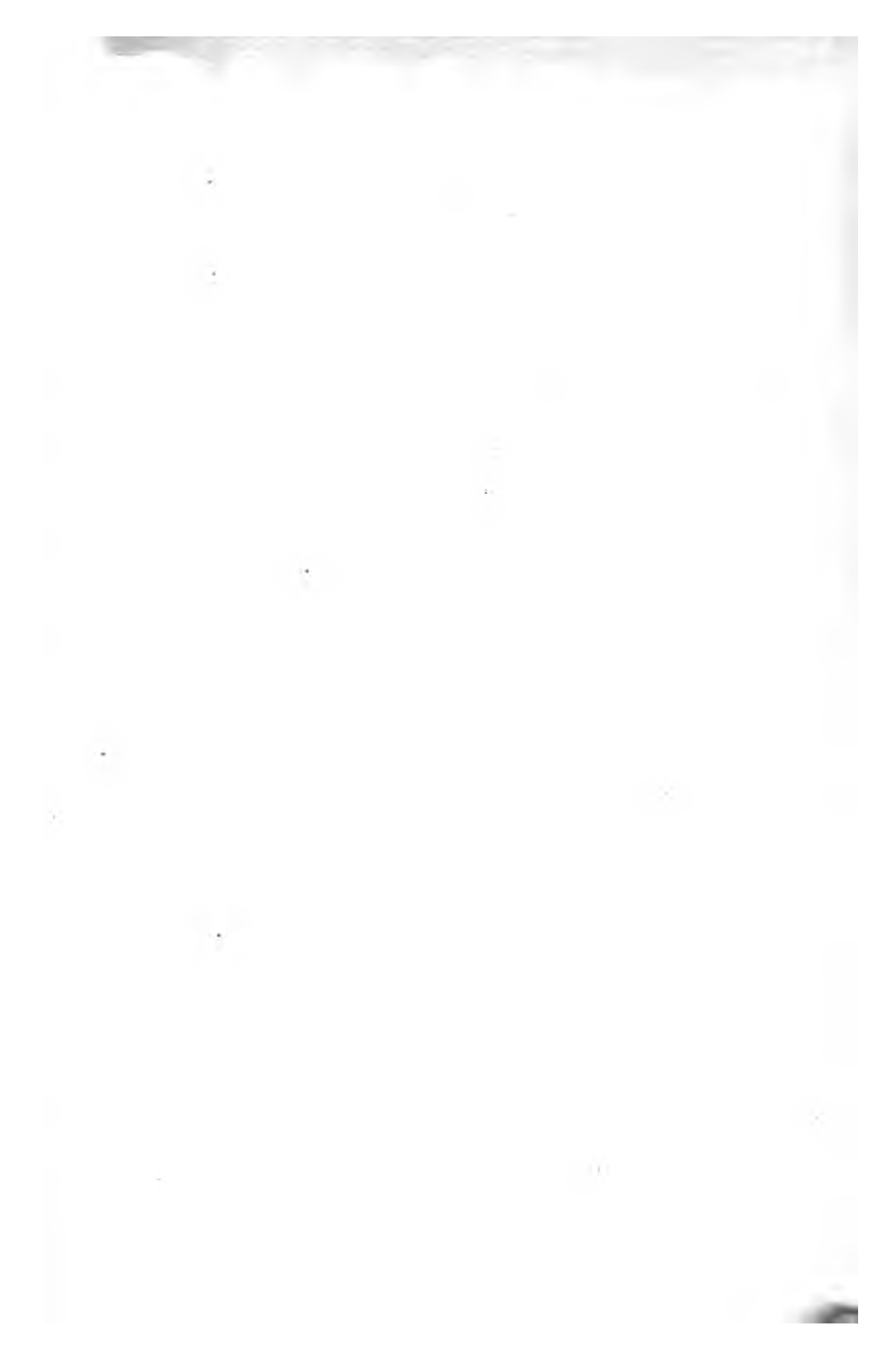
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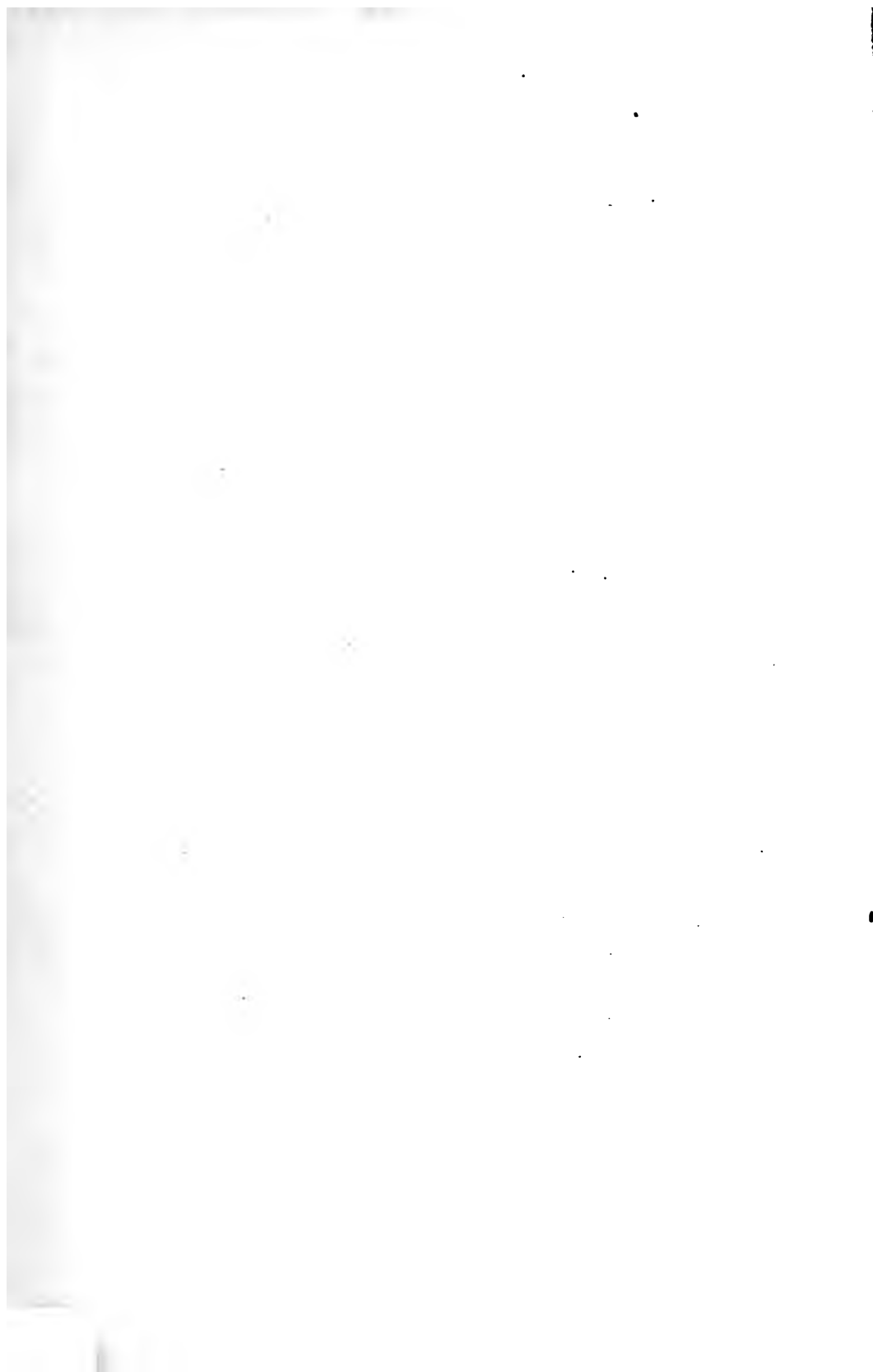
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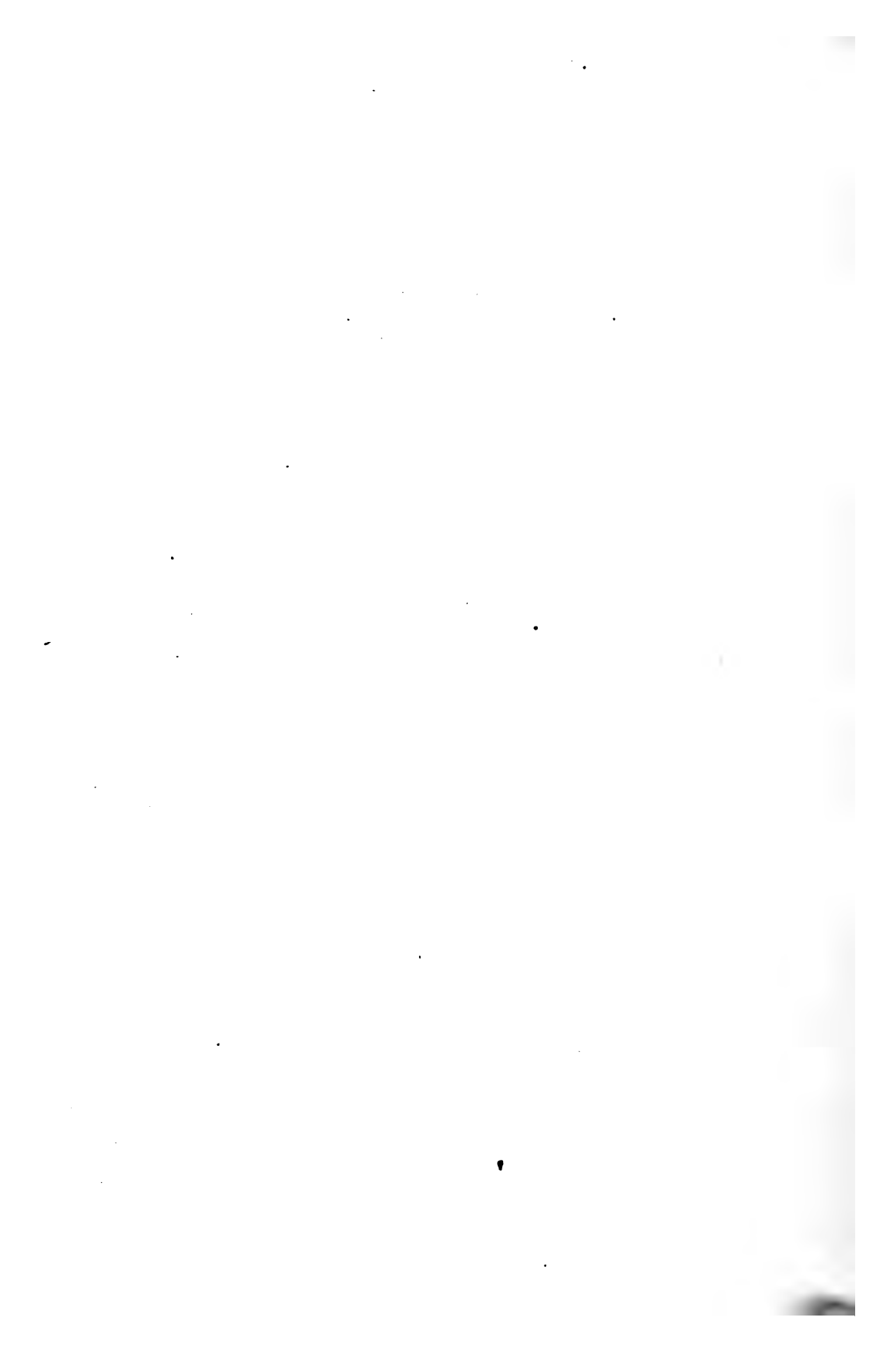
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